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NCAA Student-Athletes and Defamation: Understanding Plaintiff Classification and First Amendment Protection

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NCAA STUDENT-ATHLETES AND DEFAMATION: UNDERSTANDING PLAINTIFF CLASSIFICATION AND FIRST AMENDMENT PROTECTION

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ABSTRACT

The National Collegiate Athletic Association is a $871.6 million industry. Well over $700 million of this annual income is generated from the media, giving collegiate athletics a national platform. This brings both opportunities and downfalls to amateur athletes who play NCAA sports and the journalists who report on their sporting events. Conflict often arises on the playing field and can continue off the field. With high profile athletic events aired nation-wide, comments are bound to be made about the athletes involved in the game. Some comments may even rise to the level of defamation. Through an in-depth examination of published court cases, this thesis explored whether a court would classify a student-athlete as a public official, public figure, or private person in a defamation suit. The thesis also examined whether the student-athlete would have to prove actual malice or negligence to win a defamation claim filed against a member of the news media or a social media user.

Although few cases addressed the plaintiff status of a collegiate student-athlete or the level of fault required for a collegiate student-athlete to prove in a defamation claim, this thesis found that collegiate student-athletes would not be considered public officials. Rather, the thesis found that courts have found coaches and athletes to be either limited-purpose public figures or private persons, depending upon their level of access to media, their engagement with media regarding matters of public controversy, and their involvement in controversies. If courts consider collegiate student-athletes to be limited-purpose public figures in defamation suits regarding matters of public concern, the student-athletes may have to prove actual malice to win a defamation claim. If courts consider collegiate student-athletes to be private persons in defamation suits not related to matters of public concern, the student-athletes may have to prove negligence to win a defamation claim.

CHAPTER 1: INTRODUCTION

"If all printers were determined not to print anything till they were sure it would offend nobody, there would be very little printed."[1]

A. Josh Boutte, a Recent Example

Louisiana State University (LSU) faced the University of Wisconsin (Wisconsin) in a pre-season game, with nation-wide television coverage on September 3, 2016, at Lambeau Field in Green Bay, Wisconsin.[2] With less than one minute left in the fourth quarter, the score was close. Tension rose as LSU trailed Wisconsin by two points in the 14–16 game.[3] The LSU quarterback received the snap, only to throw an interception right into the arms of Wisconsin's D'Cota Dixon.[4] The play arguably ended and Dixon celebrated the pass with his arm in the air and index finger pointing to the sky.[5] Seconds later, LSU's offensive lineman, Josh Boutte, charged across the field. Boutte hit Dixon full force and knocked him to the ground. Officials threw their penalty flags and ejected Boutte from the game for a "flagrant hit."[6]

Immediately, a national conversation began. The Internet roared with comments concerning Josh Boutte's hit to D'Cota Dixon.[7] Viewers took to Twitter,[8] tweeting their opinions

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[1] BENJAMIN FRANKLIN, AN APOLOGY FOR PRINTERS 7 (Randolph Goodman)(1955).

[2] Jim Kleinpeter, *LSU v. Wisconsin Game Breakdown*, THE TIMES PICAYUNE, Sept. 2, 2016, http://www.nola.com/lsu/index.ssf/2016/09/lsu_vs_wisconsin_game_breakdow.html.

[3] Andrew Lopez, *LSU OL Josh Boutte ejected for flagrant his after Brandon Harris interception*, THE TIMES PICAYUNE, Sept. 3, 2016, http://www.nola.com/lsu/index.ssf/2016/09/lsu_ol_josh_boutte_ejected_for.html.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

of the hit they witnessed on television.[9] The comments were not limited to social media users; sports journalists also criticized the hit.[10]

Conflict often arises on the playing field and can continue off the field.[11] The tweets about Josh Boutte addressed him as a person and a player.[12] Similar critical comments are often made about student-athletes across the athletic arena.[13] With this narrative and so many like them occurring almost weekly in collegiate athletics, one must wonder if such statements rise to the

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[8] Twitter is a social network platform in which users can publish their thoughts in less than 140 characters.

[9] Lopez, *supra* note 3. *See, e.g.*, John (@flashzonephoto), TWITTER (Sept. 5, 2016, 7:54 AM), https://twitter.com/flashzonephoto/status/772795144638640129 (last visited Feb 24, 2017); Jeff Smithmier (@JSmithmier), TWITTER (Sept. 3, 2016, 9:34 PM), https://twitter.com/JSmithmier/status/772276581746171906 (last visited Feb 24, 2017).

[10] *See, e.g.*, Trevor Matich (@TMatich), TWITTER (Sept. 3, 2015, 5:21 PM), https://twitter.com/TMatich/status/772213028548780032 (last visited Feb 24, 2017); Ryan McCrystal (@Ryan_McCrystal), TWITTER (Sept. 3, 2016, 4:55 PM), https://twitter.com/Ryan_McCrystal/status/772206436248002560 (last visited Feb 24, 2017); Kadeem Simmons, *Athletes Need to Accept Criticism*, THE PEOPLE'S DAILY MORNING STAR, Jan. 25, 2017, https://www.morningstaronline.co.uk/a-e36b-Athletes-need-to-accept-criticism#.WMleExiZO3U;

[11] *See, e.g.*, Alysha Tsuji, *Multiple people had to hold back Doc Rivers as he furiously tried to go after refs and was ejected*, USA TODAY, Nov. 26, 2016, http://ftw.usatoday.com/2016/11/doc-rivers-clippers-ejected-furious-refs-hold-back-deandre-jordan-sam-cassell.

[12] John, *supra* note 9; Smithmier, *supra* note 11; Matich, *supra* note 13; McCrystal, *supra* note 15.

[13] *See, e.g.*, Nicole Auerbach, *The good and bad of Twitter and college athletes*, USA TODAY, Jan. 10, 2013, http://www.usatoday.com/story/sports/college/other/2013/01/10/college-athletes-twitter-criticism-johnny-manziel-kentucky/1823959/.

level of defamation[14] and how a court would assess the appropriate level of fault to apply if an athlete filed a lawsuit.

B. The NCAA and the Amateur Ceiling

The National Collegiate Athletic Association (NCAA) is the nonprofit organization governing the collegiate athletic industry.[15] The 460,000 competitors of the NCAA are often referred to as "student-athletes."[16] The name student-athlete, conveys its exact meaning—athletes attending a college or university in an effort to obtain a degree while participating in a highly competitive athletic arena. Additionally, each student-athlete must maintain amateur status.[17] This means the athletes refrain from activities such as entering into contracts with professional sports teams, playing with professional athletes, or accepting any form of payment for their athletic skill.[18]

[14] According to *Sack on Defamation: Libel, Slander, and Related Problems*, defamation is a tort in which "[t]he law [of defamation] addresses injury to reputation by communications—usually words." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-2 (Keith Voelker, 4th ed. 2010).

[15] *Revenue*, NCAA (Sept. 15, 2016), http://www.ncaa.org/about/resources/.finances/revenue.

[16] Student-Athletes, NCAA (Sept. 15, 2016), http://www.ncaa.org/student-athletes.

[17] NCAA, NCAA ELIGIBILITY CENTER: 2016-2017 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 24 (2016).

[18] *Id*. According to the NCAA, in order to maintain amateur status, a student-athlete cannot "sign a contract with a professional team, play with professionals, participate in tryouts or practices with a professional team, accept payments or preferential benefits for playing sports, accept prize money above your expenses, accept benefits from an agent or prospective agent, agree to be represented by an agent, or delay your full-time college enrollment to play in organized sports competitions." *Id*.

Despite being a nonprofit sports organization solely comprised of amateur athletes, the NCAA generates a great deal of revenue, bringing in $871.6 million annually.[19] College sporting events and collegiate athletes are heavily covered by the news media. In fact, well over $700 million, or eighty-one percent, of the NCAA's revenue was generated from the media.[20] Due to their fourteen-year-contract with CBS Sports and Turner Broadcasting, collegiate athletics are given a national platform, bringing both opportunities and downfalls to the amateur athletes who make up the playing field and the journalists who report on their sporting events.[21] For these reasons, it is imperative to address the rights of both journalists and athletes involved in the industry by exploring whether courts consider athletes to be public figures.

C. *Holt v. Cox Enterprises, Inc.*

Central to this thesis is the case of *Holt v. Cox Enterprise* in which Darwin Holt, a former football player for the University of Alabama ("Alabama"), sued Cox Enterprises, Inc. for libel[22] and invasion of privacy.[23] The cause of action stemmed from *The Tuscaloosa News* in which a series of five articles were published in the *Sunday Atlanta Journal and Constitution*.[24] The

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[19] *Revenue*, NCAA (Sept. 15, 2016), http://www.ncaa.org/about/resources/.finances/revenue. The most recent revenue report from the NCAA was given in 2011-2012.

[20] *Id*.

[21] *Id*.

[22] Libel is "written or visual defamation." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 2-10 (Keith Voelker, 4th ed. 2010).

[23] *Holt v. Cox Enters.*, 590 F. Supp. 408 (N.D. Ga. 1984).

[24] *Id*. at 410. The articles were written by Darrell Simmons, defendant to the action. The fact that Holt commented on the incident is a significant element in determining if Holt is a public figure or private person under defamation law. Following *Gertz v. Robert Welch, Inc.*, whether the plaintiff "thrust himself or his views into public controversy to influence others" was a

articles revisited the famous hit between Alabama's Darwin Holt and Georgia Tech's Chick Graning during the "highly publicized football game" between the University of Alabama and Georgia Tech.[25] The publications cited many comments made about Holt following the game and included phrases describing the hit such as, "old Alabama greeting "pow" right in the kisser, a "cheap shot" a "flying elbow," Holt's "latest act of violence," an "illegal" blow, and the striking of Graning "so savage[e] and unexplainabl[e]."[26] The U.S. District Court for the Northern District of Georgia found the published statements about Holt referred to his experience as a college athlete and injured his reputation to the degree of rising to defamation.[27] Consequently, the court deemed Holt a limited-purpose public figure,[29] which escalated his burden of proving

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significant element in determining if the plaintiff was a public figure or private person for purposes of a defamation claim." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-35 (Keith Voelker, 4th ed. 2010) (quoting *Gertz*, 418 U.S. 323, 345 (1974)).

[25] *Holt*, 590 F. Supp. at 409–410.

[26] *Id*. at 411.

[27] *Id*.

[29] In a defamation case, the court will consider the plaintiff either a public figure or a private person. In *Gertz v. Robert Welch, Inc.*, the court defined a public figure as, "those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," and a limited-purpose public figure as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-33–1-34 (Keith Voelker, 4th ed. 2010) (quoting *Gertz*, 418 U.S. at 345). *New York Times v. Sullivan* declared public officials must prove actual malice in order to meet their burden of proof in defamation cases. *Id*. at 1-36 (citing *N.Y. Times Co. v. Sullivan* 376 U.S. 254, 285-286 (1964)). Actual malice was established in *New York Times v. Sullivan*. *Id*. at 1-13. The Court defined actual malice as, "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not." *Id*. at 1-25 (quoting *N.Y. Times Co. v. Sullivan* 376 U.S. 254). In contrast, a plaintiff considered a private person by the court in a defamation case is to adopt the burden of proof set forth by that particular state "so long as it does not provide for liability without 'fault.'" *Id*. at 6-2 (quoting *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 347 (1974). Thirty-six states, including Louisiana, the District of Columbia, and Puerto

fault to that of proving "actual malice."[30] In *New York Times v. Sullivan*, the U.S. Supreme Court established actual malice[31] The Court defined actual malice as, "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not."[32] This standard provided more protection to the media against being held liable for harming the reputation of public officials and public figures on a matter of public concern.[33] Unable to prove actual malice, Holt failed in his effort to recover damages.[34]

This thesis specifically focuses on whether college athletes are considered public officials, public figures, or private persons. Additionally, this thesis explores whether college athletes must prove actual malice or negligence in the event they bring a defamation claim against a media defendant. For example, if Josh Boutte were to bring a suit against a journalist today for comments similar to those deemed defamatory in *Holt*, would Boutte also be

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Rico adopted negligence as the burden of proof for a private person claiming defamation. *Id*. at 6-3–6-5.

[30] *Holt*, 590 F. Supp. at 412-13. *See also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-13 (Keith Voelker, 4th ed. 2010).

[31] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-13 (Keith Voelker, 4th ed. 2010) (quoting *N.Y. Times Co. v. Sullivan* 376 U.S. 254 (1964).

[32] *Id*. at 1-25.

[33] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-30–1-31 (Keith Voelker, 4th ed. 2010). The justices understood the difficulty in a journalist's job of trying to report to the public while still trying to quote speakers verbatim. *Id*. at 1-30–1-31. "So long as the gist of a quotation is correct, errors that do not materially change the meaning of the statement do no constitute "actual malice" even when they are made deliberately." *Id*. at 1-30–1-31.

[34] *Holt*, 590 F. Supp. at 413.

considered a limited-purpose public figure who must prove the defamatory statements were published with actual malice?[36]

D. The Goal

Through an in-depth examination of published court cases, this thesis examined whether college athletes suing media defendants for defamation must prove actual malice or negligence.[44] In doing so, this thesis outlined the distinction between classifying a plaintiff as a public or private person in a defamation suit and circumstances under which a college athlete plaintiff should be considered a public figure. Additionally, this thesis examined First Amendment protections granted to journalists and whether such protections also extend to civilian social media users who publish potentially defamatory online statements about college athletes.

[36] *Holt v. Cox Enterprises, Inc.* is distinguishable from the question at hand in that Holt brought his cause of action over twenty years following the incident. By the time Holt brought legal action his amateur collegiate athletic career was complete. Additionally, Holt spoke publicly on the Holt-Graining hit.

[44] Negligence, according to *Black's Law Dictionar*y, is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation." *Negligence*, BLACK'S LAW DICTIONARY 1196 (10th ed. 2014).

CHAPTER 2: BACKGROUND

A. Defamation, Understanding the Basics

The law of defamation is rooted deep within principles that evolved *via* common law and *via* U.S. Supreme Court rulings involving constitutional questions.[45] In its most basic sense, defamation is the law addressing "injury to reputation by communications—usually words."[46] *The Restatement (Second) of Torts* explains how "injury to reputation" is a result of a communication that "harm[s] the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[47] This sort of injury is a tort—a cause of action that brings about the potential for damage awards to the plaintiff.[48]

The two branches of defamation are libel and slander.[49] Libel is defamation in a written or visual form while slander is oral or spoken defamation.[50] Courts are firm in considering the context of the statement to determine if it is defamatory, but they still look at the publication as a whole, refusing to segregate one phrase from the rest of the work.[51] The words in question are taken for their plain meaning or as "a person of ordinary intelligence would perceive the entire

[45] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-2 (Keith Voelker, 4th ed. 2010).

[46] *Id*. at 1-2. Opinions and rulings differ in determining what language rises to the level of defamation based on the jurisdiction of litigation. *Id*. at 2-13.

[47] *Id*. at 2-15 (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

[48] *Id*. at 1-2.

[49] *Id*. at 2-10.

[50] *Id*.

[51] *Id*. at 1-25 (citing *Julian v. Am. Bus. Consultants, Inc.*, 2 N.Y.2d 1, 23, 155 N.Y.S.2D 1, 137 N.E.2d 1 (1956)). This is particularly true where books, broadcasts, letters, newspapers, periodicals, and advertisements are concerned. *Id*. at 2-21.

statement."[52] The plain meaning provides a more narrow understanding of the language and prevents the speech in question from being taken out of context or read in an overbroad manner.[53] Additionally, *The Restatement (Second) of Torts* provides the following elements to make a prime facie[54] case for a defamation claim:

a. A false and defamatory statement concerning another;
b. An unprivileged publication to a third party;
c. Fault amounting at least to negligence on the part of the publisher; and
d. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[55]

In a defamation claim, a court categorizes the plaintiff as either a public official, a public figure, limited-purpose public figure, or a private person.[56] A public official, public figure, or

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[52] *Id*. at 2-22 (quoting *Fitzjarrald v. Panhandle Publ'g Co.*, 149 Tex. 87, 228 S.W.2d 499, 504 (1950)).

[53] *Id.* at 2-23.

[54] According to *Black's Law Dictionary*, a prime facie case is, "(1) The establishment of a legally required rebuttable presumption. (2) A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Prima Facie Case*, BLACK'S LAW DICTIONARY 1382 (10th ed. 2014).

[55] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 2-6 (Keith Voelker, 4th ed. 2010) (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[56] *New York Times v. Sullivan* declared public officials must prove actual malice in order to meet their burden of proof in defamation cases. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-36 (Keith Voelker, 4th ed. 2010) (citing *N.Y. Times Co.*, 376 U.S. at 285-286). Actual malice was established in *New York Times v. Sullivan*. *Id*. at 1-13. The Court defined actual malice as, "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not." *Id*. at 1-25 (quoting *N.Y. Times Co. v. Sullivan* 376). In *Gertz v. Robert Welch, Inc.*, the Court defined a public figure as, "those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id*. at 1-33–1-34 (quoting *Gertz*, 418 U.S. at 345). In contrast, a plaintiff considered a private person by the court in a defamation case is to adopt the burden of proof set forth by that particular state "so long as it does not provide for liability without "fault." *Id*. at 6-2 (quoting *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 347 (1974)). Thirty-six states, including Louisiana, the District of Columbia,

limited-purpose public figure must show actual malice in order to recover pecuniary damages for a defamation claim.[57] Actual malice is a heightened standard of proving fault established in *New York Times v. Sullivan.*[58] The Court defined it as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."[59] In other words, the plaintiff must clearly and concisely prove the defendant knew the statement was false and published it anyway with reckless disregard for the truth.[60]

In contrast, a private person adopts the burden of proof set forth by that particular state "so long as it does not provide for liability without "fault."[61] The majority of the states adopted negligence as the burden of proving fault for a private person.[62] Negligence is a lesser standard to that of actual malice. It requires the application of the "reasonable person" test which asks if a reasonable person under reasonable circumstances or reasonable industry practices knew or would have known the statement was defamatory.[63]

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and Puerto Rico adopted negligence as the burden of proof for a private person claiming defamation. *Id*. at 6-3–6-5.

[57] *Id*. at 1-36 (citing *N.Y. Times Co.*, 376 U.S. at 254).

[58] *Id*. at 1-13.

[59] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)

[60] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-8 (Keith Voelker, 4th ed. 2010) (quoting *N.Y. Times Co. v. Sullivan* 376 U.S. 285—86).

[61] *Id*. at 6-2 (quoting *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 347 (1974).

[62] *Id*. at 6-3–6-5.

[63] *Id*. at 6-6.

Starting in 1964, defamation law evolved across the country as a result of U.S. Supreme Court rulings.[64] This jurisprudence challenged the Court in balancing the necessity of justice for those harmed by defamation while still honoring the First Amendment right to free speech.[65]

B. The Case Law Evolution of Defamation

1. *New York Times v. Sullivan*

In 1964, the U.S. Supreme Court faced a new frontier in defamation law.[66] For the first time, the Court decided the degree of constitutional protection afforded to a "public official," L.B. Sullivan, in his defamation claim against four African American Ministers and The New York Times Company.[67]

Sullivan was the Commissioner of Public Affairs responsible for supervising the police, fire, cemetery, and sales departments in Montgomery, Alabama, in 1960.[68] In March of 1960, The "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" purchased an advertisement in the *New York Times* at the price of $4,552.[69] The goal of the advertisement was to "draw attention to King's plight through a full-page ad in the New York Times that would also call attention to the sit-in movement generally and events in Montgomery

[64] *Id*. at 1-2.

[65] *Id*.

[66] *N.Y. Times Co.* 376 U.S. at 256.

[67] *Id*.

[68] *Id*.

[69] KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL-RIGHTS, LIBEL LAW, AND THE FREE PRESS 15 (2011).

specifically."[70] On March 28, 1960, members of the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" met to discuss the article—the committee members feared "the ad lacked emotional appeal, so much so that the civil rights leader worried that it would not generate enough of a response to cover the $4,552 charged by the *Times* to run it."[71] As a result, the committee members added a list of names, attacking sixty-four community members who held a public position.[72] The list was endorsed by four Alabama Ministers without their consent— Ralph D. Abernathy, Solomon S. Seay Sr. , Fred L. Shuttlesworth, and Joseph E. Lowery.[73]

The advertisement ran in the *New York Times* on March 29, 1960.[74] It highlighted the peaceful civil rights demonstrations of "Southern Negro students."[75] The goal of the advertisement was to raise awareness for Dr. Martin Luther King's legal needs as he was in prison pending a perjury indictment.[76] Additionally, this advertisement spoke publicly on the "wave of terror" the demonstrators faced in their efforts to garner support for the civil rights movement, obtain the right to vote, and foster support for Dr. Martin Luther King, Jr.[77] This

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[70] *Id*. at 16.

[71] *Id*. at 17.

[72] *N.Y. Times Co.*, 376 U.S. at 257. The sixty-four people named in the advertisement were involved in trade unions, performing arts, public affairs, religious organizations, and more. *Id*.

[73] KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL-RIGHTS, LIBEL LAW, AND THE FREE PRESS 17 (2011).

[74] *Id*. at 18.

[75] *N.Y. Times Co.*, 376 U.S. at 256.

[76] *Id*. at 257.

[77] *Id*.

"wave of terror" was a stab at the list of sixty-four community members listed within the advertisement, all of which held some sort of public position.[78]

The advertisement told the story of police officers who "ringed the Alabama State College Campus" with shotguns and tear-gas when they dispelled a group of students singing "My Country, 'Tis of Thee' at the State Capital.[79] The advertisement alleged how student protests were met with officers padlocking the dining hall "in an attempt to starve them into submission."[80]

Following the publication of the advertisement, Sullivan brought suit against the four ministers and The New York Times Company seeking $500,000 in damages.[81] The plaintiff claimed that although he was not mentioned by name, the reference to the police "ringing" the campus and bringing a "wave of terror" was an accusation directed toward Sullivan as Commissioner of Public Affairs and his authority over the police force.[82] The goal of Sullivan and other commissioners was "to punish the Times and, through a victory in court yielding large damages, to stop the Times and other northern media from reporting what they considered a

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] *Id*. at 256.

[82] *Id*. at 258.

biased and unfair view of events in the South."[83] The Alabama jury trial found the New York Times Company and the four ministers liable for defamation.[84]

The U.S. Supreme Court decided to hear Sullivan's case on review to decide whether "an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."[85] In his opinion, Justice Brennan revisited *Whitney v. California* and expressed his deepest concerns with keeping public issues a part of a wide-open debate.[86] In his *New York Times v. Sullivan* opinion, Justice Brennan quoted Justice Brandeis' concurring opinion in *Whitney* which stated:

> [I]t is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievance and proposed remedies; and that the fitting remedy for evil counsels is good ones. . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[87]

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[83] KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL-RIGHTS, LIBEL LAW, AND THE FREE PRESS 45 (2011).

[84] *Id.* at 68.

[85] *Id.* at 268.

[86] In *Whitney v. California*, Justice Sanford stated, "That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Whitney v. Cal.*, 274 U.S. 357, 371 (1927).

[87] *N.Y. Times Co.*, 376 U.S. at 270. It is worth noting that recent scholarship on Brandeis connects the use of this language in *Whitney v. California* to the modern conceptualization of free expression rights. Neil M. Richards, *The Puzzle of Brandeis, Privacy and Speech*, 63 Vanderbilt L.J. 1295, 1342 (2010).

Justice Brennan held firm to the belief that the First Amendment allowed citizens to discuss public officials and public matters even if such conversation bred unpleasant thoughts and reactions.[88] Charged with writing the opinion, Justice Brennan provided new guidelines:

> The case had to be reversed, a standard had to be articulated comparable to those in the obscenity and denaturalization cases, a rule of actual malice had to be included, and comments on public officials and their work had to be distinguished from attacks on private citizens. [89]

As a result, the Court ruled, for the first time, that in order for a public official to recover punitive damages in a defamation claim related to the official's duties, the official must prove the alleged defamatory statement was made with actual malice.[90] The Court found that "the evidence was incapable of supporting the jury's finding that the allegedly libelous statements were made of and concerning Sullivan.[91] The Court also found the evidence did not indicate the newspaper published the advertisement with knowledge of its falsity or with reckless disregard for the truth.[92] Therefore, Sullivan could not prove actual malice— the case was reversed and remanded,

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[88] *N.Y. Times Co.*, 376 U.S. at 270. Justice Brennan's school of thought was a more broad approach than the fair-comment doctrine—a doctrine that allowed for open comment on "matters of public interest" so long as those comments "were both "reasonable" and based upon facts fairly stated or known to the recipients of the communications." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-13 (Keith Voelker, 4th ed. 2010).

[89] KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL-RIGHTS, LIBEL LAW, AND THE FREE PRESS 165 (2011).

[90] *N.Y. Times Co.*, 376 U.S. at 270–80. Actual malice is a standard of law that requires the plaintiff to prove the defendant made the alleged defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." Proof of actual malice is only required when the plaintiff seeks punitive damages. *Id*. at 283. If the plaintiff seeks general damages, actual malice is presumed. *Id*.

[91] KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL-RIGHTS, LIBEL LAW, AND THE FREE PRESS 179 (2011) (internal quotation marks omitted).

[92] *N.Y. Times Co.*, 376 U.S. at 288–89.

and the New York Times Company and the four ministers were found not to be liable for defamation.[93]

The ruling in *New York Times Co. v. Sullivan* was significant because it was the first time a uniform standard was made by a unanimous Supreme Court regarding public officials in libel suits.[94] Additionally, the standard was one of a heightened degree.[95] In proving actual malice, the public official was required to show the presence of actual malice with the "convincing clarity which the constitutional standard demands."[96] Consequently, fault became a constitutional requirement in cases involving media defendants.

Although Sullivan fell short in meeting his burden of proof, the New York Times victory brought enormous advancement to the law on defamation. Setting such a high standard greatly broadened the scope of the First Amendment, affording more protection to journalists.[97] This ruling was so significant that Dean Prosser declared it "unquestionably the greatest victory won by the defendants in the modern history of the law of torts."[98]

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[93] KERMIT L. HALL & MELVIN I. UROFSKY, NEW YORK TIMES V. SULLIVAN: CIVIL-RIGHTS, LIBEL LAW, AND THE FREE PRESS 179 (2011).

[94] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-7 (Keith Voelker, 4th ed. 2010).

[95] *Id.* at 1-8.

[96] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-8 (Keith Voelker, 4th ed. 2010) (quoting *N.Y. Times Co. v. Sullivan* 376 U.S. 285—86).

[97] *Id*. at 1-6.

[98] *Id*. at 1-25 n.23.

2. *Curtis v. Butts*

The law on defamation evolved yet again in 1967 when the U.S. Supreme Court addressed a defamation claim involving a "public figure" in *Curtis Publishing Company v. Butts*.[99]

Wally Butts was the athletic director at the University of Georgia (Georgia) when he sued Curtis Publishing Company for publishing the article, "The Story of a College Football Fix."[100] The article accused Butts of intentionally losing the football game between Georgia and the University of Alabama (Alabama) while he was the head football coach at Georgia.[101] The article told George Burnett's[102] story of how he heard Butts' phone call with Alabama's coach, Paul Bryant. Based on Burnett's account, an editor for Curtis Publishing Company reported that Burnett overheard, "Butts outlin[e] Georgia's offensive plays … and [he] told [Bryant] … how Georgia planned to defend … Butts [also] mentioned both players and plays by name."[103] The article called Butts' ethics as a coach into question.[104] It concluded with the statement, "The changes are that Wally Butts will never help any football team again . . . where it will end no one so far can say. But careers will be ruined, that is for sure."[105] After Burnett reported what he

[99] *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 133 (1967).

[100] *Id*. at 135.

[101] *Id*.

[102] George Burnett was an insurance agent from Atlanta, Georgia. *Id*. at 136.

[103] *Id*.

[104] *Curtis Pub. Co.*, 388 U.S. at 137.

[105] *Id.*

heard to Georgia's head coach, Butts resigned from his position at Georgia "for health and business reasons."[106]

Following publication of the article, Butts sued Curtis Publishing Company for punitive damages in the amount of $5,000,000.[107] At the Georgia jury trial, Curtis Publishing Company used the defense of truth.[108] The game in question was reviewed by experts and compared to the alleged conversation between Butts and Bryant finding extreme contradictions between the two.[109] Consequently, the investigative journalism in the article was called into question.[110] The jury trial found Curtis Publishing Company liable for defamation against Butts.[111] The jury also awarded punitive damages declaring there was "malice" —a requirement for punitive damages under Georgia law.[112] When this case reached the U.S. Supreme Court, the Court held the *New York Times v. Sullivan* actual malice standard was inappropriate in this case because Butts was not a public official.[113] As a result, they faced the decision of whether to hold Butts to the actual malice standard.[114]

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[106] CLIFTON O. LAWHORNE, THE SUPREME COURT AND LIBEL 49 (Howard Rusk Long 1981).

[107] *Curtis Pub. Co.*, 388 U.S. at 137.

[108] *Id.* at 138.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*. at 135. It appeared Butts was employed by the State as athletic director and former football coach of the University of Georgia, thus making him a public official. However, he was actually employed by a private corporation, the Georgia Athletic Association, thus he was not a public official. *Id*. On appeal to the Fifth Circuit Court of Appeals, Judge Rives dissented that

In his opinion, Justice Harlan declared the only way to find balance between libel actions and free speech is to focus on the conduct element of the action.[115] In doing so, "officials could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity."[116] Put simply, the conduct of the publisher and the plaintiff were crucial in finding the balance between the tort action, the constitutional right of free speech, and the standard at which the plaintiff should be held. It was out of this thought that Harlan developed the "public figure" standard—a category in which he placed Butts.[117]

Harlan deemed Butts a public figure because he "commanded a substantial amount of independent public interest at the time of the publication."[118] While he was not a public official, the topic on which the article was based was still of great interest to the public because of his position as a coach and athletic director at Georgia.[119] Consequently, the U.S. Supreme Court declared a significant new rule of law stating that public figures, although not public officials,

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New York Times v. Sullivan "was applicable because Butts was involved in activities of great interest to the public." *Id*. at 140.

[114] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-10 (Keith Voelker, 4th ed. 2010).

[115] *Curtis Pub. Co.*, 388 U.S. at 153.

[116] *Id*.

[117] *Id*. Declaring a plaintiff a public figure was merely dicta and not legal precedent. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-12 (Keith Voelker, 4th ed. 2010). The court did not explicitly make the public figure standard precedent until *Gertz*. *Id*. at 1-12–1-13. (citing *Gertz*, 418 U.S. at 336 n.7).

[118] *Curtis Pub. Co.*, 388 U.S. at 160.

[119] CLIFTON O. LAWHORNE, THE SUPREME COURT AND LIBEL 51 (Howard Rusk Long 1981).

were still capable of recovering pecuniary damages in a defamation claim so long as they meet the heightened standard of fault by proving actual malice.[120]

Aside from the fact that Butts was able to prove actual malice and win his defamation claim, this case brought with it an even greater victory in the advancement of defamation claims.[121] By defining Butts as a "public figure" and not a "public official," the U.S. Supreme Court created a new category and heightened standard in which a plaintiff can be classified.[122] The significance of this new category grants greater protection for speech under the First Amendment by classifying the plaintiff as either a public official or public figure. [123] The alternative would be to determine if the speech, itself, is of public concern. [124] This approach would not grant the same degree of First Amendment protection.[125]

Simultaneous to the *Curtis Publishing Company v. Butts* case, the Court faced the issue of determining whether Edwin A. Walker was a public figure in *Associated Press v. Walker*.[126] Walker was a retired United States Army major general. His case arose out of a publication

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[120] *Curtis Pub. Co.*, 388 U.S. at 160.

[121] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS *Problems* 1-11 (citing *Curtis Pub. Co.*, 388 U.S. at 156–159).

[122] In his concurring opinion, Chief Justice Warren discussed how he felt it unnecessary to distinguish between a public official and a public figure—both should rise to the level of actual malice without creating separate standards. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-11 (Keith Voelker, 4th ed. 2010).

[123] DONALD M. GILMOR, POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW 151 (1992).

[124] *Id.*

[125] *Id.*

[126] *Curtis Pub. Co.*, 388 U.S. at 140–142.

discussing integration and riots at the University of Mississippi.[127] As an outspoken critic of integration, the U.S. Supreme Court deemed Walker a public figure not simply because of his position as seen in *Curtis Publishing Company v. Butts*, but because he "thrust his personality into the vortex of an important public controversy."[128] Because Walker placed himself in a conversation of public concern, he made himself a public figure and had to meet the actual malice standard.[129]

3. *Rosenbloom v. Metromedia, Inc.*

In 1970, the conversation surrounding defamation law briefly shifted from classifying the plaintiff in a defamation suit to classifying the speech itself. In a plurality opinion,[130] *Rosenbloom v. Metromedia, Inc.* introduced the idea of defamatory speech being privileged due to the content being a "public issue."[131]

In 1963, the Philadelphia Police Department's Special Investigations Squad cracked down on obscene magazines sold at newsstands.[132] Captain Ferguson of the police squad took it

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] According to Black's Law Dictionary, a plurality opinion is, "An opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." *Opinion*, BLACK'S LAW DICTIONARY 1266 (10th ed. 2014). This is significant to note because it shows the *Rosenbloom v. Metromedia, Inc.* decision was not unanimous. As a result, the "public issue" holding does not carry the weight of a unanimous decision.

[131] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-13 (Keith Voelker, 4th ed. 2010).

[132] *Rosenbloom v. Metromedia*, 403 U.S. 29, 32 (1971).

upon himself to determine what material was or was not obscene.[133] On October 1, 1963, the police arrested several newsstand operators who were allegedly selling obscene magazines.[134] George Rosenbloom was among those arrested.[135] Police also searched and seized magazines and books in his warehouse.[136] Rosenbloom was arrested twice surrounding the two incidents.[137]

Captain Ferguson reported to WIP, a local radio station, about Rosenbloom's arrest.[138] WIP delivered a segment entitled "City Cracks Down on Smut Merchants," reporting Rosenbloom possessed 3,000 obscene books.[139] In the subsequent reports, WIP corrected themselves and characterized the books as "reportedly obscene."[140] The broadcast also accused Rosenbloom of having "smut literature" and of being one of the "girlie-book peddlers."[141]

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[133] *Id.* According to *Black's Law Dictionary*, obscenity is, "The quality, state, or condition of being morally abhorrent or socially taboo, especially as a result of referring to or depicting sexual or excretory functions. Something (such as an expression or act) that has this characteristic." *Obscenity*, BLACK'S LAW DICTIONARY 1245 (10th ed. 2014). Commercialized obscenity is, "Obscenity produced and marketed for sale to the public." *Commercialized Obscenity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[134] *Rosenbloom*, 403 U.S. at 32.

[135] *Id.*

[136] *Id.* at 33.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* at 34.

[141] *Id.*

At trial, The Pennsylvania State Court acquitted Rosenbloom of the charges on the grounds that the material was not actually obscene.[142] However, Rosenbloom was not done fighting this battle. He sued WIP in Pennsylvania State Court, [143] claiming their description of his books as "obscene" along with the language of "smut literature" and being a "girlie-book peddle[r]" was defamatory, and harmed his reputation.[144] Furthermore, Rosenbloom argued he was a private person, and, as such, was unable to defend his reputation with the ease a public official or public figure could.[145] His arguments were denied any validity.[146]

When the case reached the U.S. Supreme Court, the justices chose a different approach in their decision by examining the alleged defamatory speech, itself.[147] In his opinion, Justice Brennan held the priority must be given to the public's interest in the speech and the event, not the plaintiff's "prior anonymity."[148] With this holding, Justice Brennan articulated citizens' right to communicate about what issues are occurring in their communities and the press'

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[142] *Id.* at 36.

[143] According to state law, Pennsylvania grants "absolute immunity for defamatory statements made by high state officials, even if published with an improper motive, actual malice, or knowing falsity." *Id.* at 38. It also affords a conditional privilege to the press to report harmful information so long as it is not published with the intent to defame that person, but instead to inform the public. *Id.* Pennsylvania expects publications to occur with "reasonable care and diligence to ascertain the truth," and failure to do so may deem the immunity null and void. *Id.*

[144] *Id.* at 36 and 42.

[145] *Id.* at 42.

[146] *Id.*

[147] *Id.* at 43.

[148] *Id.*

constitutional right to publish those issues.[149] As a result, a private person with a defamation claim involving speech of public interest must meet the actual malice standard in order to recover.[150]

4. *Gertz v. Robert Welch*

In 1973, almost ten years after *New York Times, Co. v. Sullivan*, the U.S. Supreme Court further explained the meaning of a public figure and introduced another category of classifying a defamation plaintiff increasing plaintiff classification to three categories—public official, public figure and private person. [151]

Elmer Gertz was the legal counsel to the Nelson family whose son was shot and killed by a policeman named Nuccio.[152] Following the conviction of Nuccio, the John Birch Society created cross-country rhetoric "to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship."[153] The John Birch Society published their monthly newsletter, *American Opinion*, and declared Gertz "an architect of the frame-up… an official to the Marxist League for Industrial Democracy… a Leninist and a

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[149] *Id.*

[150] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-16 (Keith Voelker, 4th ed. 2010). Several justices, including Justice Harlan and Justice Marshall, did not agree with Justice Brennan's opinion. *Id.* at 1-1. To start, both justices felt a private person need only prove strict liability in order to recover for the harm he endured. Both felt Justice Brennan's public interest standard left too much discretion to the court in determining what was "newsworthy" on a case by case basis. Justice Marshall also believed Justice Brennan's public interest standard did not fully protect citizens from reputational harm, going against basic rights of human dignity. *Id*. at 1-17.

[151] *Gertz v. Robert Welch* 471 F.2d 801.

[152] *Id.* at 325.

[153] *Id.*

Communist-fronter."[154] Following the release of the article, Gertz sued the John Birch Society for defamation.[155]

The U.S. Supreme Court aimed to determine Gertz's burden of proof by declaring him either a public official or public figure.[156] Interestingly, the Court found Gertz was neither.[157] This compelled the court to consider "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."[158]

To answer this question, the Court first explicitly defined public figures as people who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," those who "have thrust themselves to the forefront of particular public controversies[159] in order to influence the resolution of the issues involved."[160] In

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[154] *Id.* at 325–326 (internal quotation marks omitted).

[155] *Id.* at 326.

[156] *Id.* at 328.

[157] *Id.* at 332.

[158] *Id.*

[159] Public controversy involves matters that "are legitimately a subject of public discussion or debate rather than matters of mere curiosity." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-58 (Keith Voelker, 4th ed. 2010). In contrast, a private controversy is one of private matters. That being said, if the media affords a private controversy so much attention as to bring it to the forefront of public debate, it is still, itself, a private controversy. *Id.* at 5-61.

[160] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-33–1-34 (quoting *Gertz*, 418 U.S. at 345 (Keith Voelker, 4th ed. 2010)). Although the U.S. Supreme Court used public figure in *Curtis Publishing Company v. Butts*, this is the first explicit definition and use of the term. *Id.*

doing so, the Court created a "limited-purpose" public figure.[161] These are people who, "By propelling themselves into the "vortex" of public disputes, they, too, surrender some protection for their reputation, but only insofar as the communication relates to their involvement in the dispute."[162]

Next, the Court explained the first remedy to a defamatory statement is to "minimize [the statement's] adverse impact on reputation."[163] Because public officials and public figures have a much greater degree of access to communication outlets and a greater ability to reach the masses, they also have a greater ability to "minimize its adverse impact on reputation."[164] This access affords public officials and public figures greater protection from defamatory statements. [165] In contrast, a private person has less access to communication channels, thus having less ability to remedy the situation. [166] Consequently, private persons have a greater risk of injury when faced with defamatory statements. [167]

In a split decision, the Court declared Gertz a private person by looking at his total involvement in the affair. The Court held that because Gertz was not involved in the criminal case, did not discuss the civil case with a reporter, and did not "thrust himself into the vortex of

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[161] *Id.* at 1-323.

[162] *Id.*

[163] *Gertz*, 418 U.S. at 344.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

this public issue," his basic involvement as the Nelsons' legal counsel was not enough to deem him a public figure.[168] Gertz was, thus, not required to prove The John Birch Society acted with actual malice.[169] Since the ruling, in *Gertz*, states are not required to hold private plaintiffs to the actual malice standard in defamation claims filed by private persons.[170]

C. Defamation, Non-Media Defendants, and Private Concerns

In 1985, The U.S. Supreme Court addressed a case that dealt with determining the standard for a non-media defendant accused of defamation regarding a private matter in *Dun & Bradstreet, Inc. v. Greenmoss Builders.*[171]

The U.S. Supreme Court compared this case to *Gertz v. Welch*.[177] Because the court was split in *Gertz*, the U.S. Supreme Court was then and still is hesitant in deciding whether the *Gertz* standard is applicable to non-media defendants.[178] Some states explicitly stated the *Gertz* standard is only to be applied to "institutional media" when dealing with private plaintiffs.[179]

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[168] *Id.* at 349.

[169] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS *Problems* 1-17 (Keith Voelker, 4th ed. 2010).

[170] *Id.* at 6-2.

[171] *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 751 (1985). The *Dunn & Bradstreet, Inc. v. Greenmoss Builders* ruling is not as significant as the preceding U.S. Supreme Court cases for the purposes of this paper.

[177] *Id.* at 752.

[178] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-3 (Keith Voelker, 4th ed. 2010).

[179] *Id.*at 6-24. These states are Colorado, Delaware, Iowa, Illinois, Minnesota, Oregon, Kentucky, and Wisconsin. *Id.*

Similarly, other states have not allowed plaintiffs to bring in private defendants.[180] This means, plaintiffs are also limited to bring a claim against "institutional media" only.[181] Unlike the defendant in *Gertz*, the defendant in *Dun & Bradstreet, Inc.* was not a media company.[182] The Court was sensitive in recognizing the difficulty that often arises in distinguishing between media and non-media defendants.[183] However, the Court stated that a credit report agency is distinctly a non-media entity.[184] Justice Powell, in his *Dun & Bradstreet, Inc.* opinion, explained the alleged defamatory speech was not a public issue[185] and did not fall within the scope of the media protections of the *Gertz* actual malice standard.[186]

Additionally, the Court provided three significant principals with their ruling in *Dun & Bradstreet, Inc.*[187]

> First, it removed vast amounts of speech from the full protection of *Gertz* . . . . Second, Justice Powell's plurality opinion put courts back into the business of judging, on a case-by-case basis, what is of legitimate public concern . . . . Third, *Dun & Bradstreet* left courts without guidance as to how to make the

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[180] These states are Hawaii, Oklahoma, and Texas. *Id.* at 6-25.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 1-21.

[183] *Dun & Bradstreet*, 472 U.S. at 753.

[184] *Id.*

[185] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-21 (Keith Voelker, 4th ed. 2010). There is no clear reason as to exactly why the alleged speech was not public concern *Id.*at 1-23.

[186] *Dun & Bradstreet*, 472 U.S. at 753.

[187] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-22 (Keith Voelker, 4th ed. 2010).

> determination of what was and what was not a matter of legitimate pubic concern.[188]

Justice Powell explained that the First Amendment is more concerned with protecting public matters as opposed to private ones.[189] While there are still protections surrounding private matters and the ability to publish them, First Amendment protection is "less stringent" where they are concerned.[190]

[188] *Id.* at 1-22–1-23.

[189] *Id.*at 1-21.

[190] *Id.*

CHAPTER 3: LITERATURE REVIEW

"*Congress shall make no law…prohibiting…the freedom of speech, or of the press.*"[199]

A. The First Amendment and Free Speech Theory

Every democracy protects speech but the United States provides the highest degree of protection.[200] The First Amendment establishes the Constitutional right to freedom of speech, the press, religion, and expression.[201] This protection is afforded at varying levels depending on the societal value of the speech.[202]

All branches of government are prohibited from restricting free speech and restricting the press.[203] They are, however, allowed to regulate speech.[204] This occurs through the balancing of constitutional values and regulatory interests.[205] There are several situations in which speech is not protected. For example, speech is not protected when

(1) [e]xpression has slight, if any social value;
(2) [When the speech] [p]resents a direct, imminent, and probable danger of inciting unlawful conduct;
(3) [When the speech] [d]efames a private person at least negligently and a public official or figure with actual malice
(4) [When the speech] [i]nvades privacy in an unacceptable way;
(5) [When the speech] [a]dvertises a good or service that is illegal, or does so falsely or deceptively;

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[199] U.S. CONST. amend. I.

[200] DANIEL A. FARBER, THE FIRST AMENDMENT 1 (3rd ed. 2010).

[201] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 1-2 (2008).

[202] RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 18 (2003).

[203] *Id*. at 17.

[204] *Id*. at 18.

[205] *Id*.

(6) [When the speech] [r]epresents a commercial speech that is outweighed by a substantial state interest and governed by regulation that is narrowly tailored to achieve its objective; and
(7) [When the speech] [i]s sexually explicit (albeit not obscene) and readily available to children.[206]

This type of speech is thought to be outside the scope of the First Amendment's protection and, thus, falls into the category of "unprotected" speech.[207] Unprotected speech includes libel, obscenity, and fighting words.[208]

Several cases before the U.S. Supreme Court required the application of the First Amendment to the law on defamation. This jurisprudence developed a roadmap to understanding the application of the First Amendment and how it protects speech and the press. Cases such as *New York Times Co. v. Sullivan*, *Curtis v. Butts*, *Rosenbloom v. Metromedia, Inc.*, and *Gertz v. Robert Welch* bridged the gap between the First Amendment and its actual application in defamation suits. Many questions remain unanswered as to how the justices reached their conclusions and why they applied the First Amendment in such a manner. Consequently, several theories emerged in an effort to create a foundation for First Amendment application.[209] However, as Thomas Emerson said, "The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."[210]

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[206] *Id*. at 17.

[207] DANIEL A. FARBER, THE FIRST AMENDMENT 13 (3rd ed. 2010).

[208] *Id.*

[209] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-3 (2008).

[210] MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARY 11 (2001) (quoting Thomas I. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970)).

The U.S. Supreme Court has yet to proclaim a prevailing theory of the First Amendment.[211] The many attempts to answer the "why questions" of the First Amendment are referred to as "free speech theory."[212] Under this theory, the "why questions" are significant because understanding "why the First Amendment exists will tend to influence heavily one's views on *what* it means and *how* it should be implemented."[213] Of the theories that emerged from free speech theory, the ones that weigh in heavily for the purpose of this thesis are the marketplace of ideas, the checking value, and the watchdog theory.

B. The Marketplace of Ideas and Its Influence on Defamation

The "marketplace of ideas" theory was created through a combination of works by John Milton and John Stuart Mill. [214] In *Areopagitica*,[215] John Milton stressed that in the realm of public conversation and one's ability to speak freely, truth would always be victorious in the battle against false speech.[216] Building on Milton's philosophy, John Stuart Mill, was passionate about writing on the dangers of suppressing public opinion even if the public opinion was

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[211] *Id.* at 11.

[212] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-3 (2008). The "why questions" consist of, "Why does the First Amendment exist? What is the purpose of freedom of speech? Is freedom of speech accommodated and balanced against one another in a democratic society, or is freedom of speech special in some sense — a freedom to be placed in an elevated "preferred position" in the hierarchy of social values?" *Id.*

[213] *Id.*

[214] ENCYCLOPEDIA OF THE FIRST AMENDMENT 2, at 708 (John R. Vile et al. eds., 2009).

[215] *Areopagitica* was Milton's 1644 response to a printing ordinance implemented by Parliament which required writers to have their work "approved by an official licenser before publication of printed materials." *Areopagitica* is historically seen as the foundation for free speech scholarship. *Id.*

[216] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-13 (2008).

wrong.[217] Mill's philosophy supported unorthodox speech, explaining that what appears to be unorthodox at first can later evolve into the norm.[218] Mill's publication was intended to promote the idea that "self protection is the *only* legitimate reason to interfere with another person's liberty."[219] By combining both Milton and Mill's beliefs, the marketplace of ideas theory was born and became a cornerstone of First Amendment theory.[220]

The marketplace of ideas is a theory that indicates in order to "test the truth or acceptance of ideas" those ideas must be free to compete in an "open market."[221] Under this theory, leaving the ability to ascertain the truth to the will of the government or authoritative censorship does not ensure truth will prevail.[222] The theory, itself, focuses more on the process of ascertaining the truth rather than ensuring everything said is truthful.[223] In other words, "the marketplace of ideas focuses on the "truth-seeking function."[224]

Since the goal of the First Amendment is to ensure free speech and expression, the marketplace of ideas provides a vehicle in which to accomplish that.[225] This theory is a metaphor

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[217] *Id.* at 2-13–2-14. John Stewart Mills did so in his publication, *On Liberty*. *Id.* at 2-13–2-14, 2-14 n. 2.

[218] ENCYCLOPEDIA OF THE FIRST AMENDMENT 2, at 746 (John R. Vile et al. eds., 2009).

[219] *Id.* at 708 (emphasis added).

[220] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-14 (2008).

[221] ENCYCLOPEDIA OF THE FIRST AMENDMENT 2, at 708 (John R. Vile et al. eds., 2009).

[222] *Id.*

[223] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-17 (2008).

[224] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 Cal. L. Rev. 2353, 2363 (2000) (quoting Hustler Magazine, 485 U.S. at 52).

[225] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-22 (2008).

for the economic marketplace.[226] For example, in an economic marketplace, the better the product, the stronger the likelihood of surviving the marketplace competition.[227] Similarly, in the marketplace of ideas, the better the idea the more likely it is to survive competition and is, thus, accepted as truth.[228]

Several Supreme Court Justices and scholars latched on to this theory. Justice Oliver Wendell Holmes and Justice Louis Brandeis publicly solidified this theory with their support.[229] Justice Brandeis even wrote, "Freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[230] Put simply, the marketplace of ideas theory protects all ideas and citizens' ability to freely express those ideas in an effort to prevent authoritative institutions from censoring truth.[231]

The marketplace of ideas influenced scholars including C. Edwin Baker and Thomas Scanlon.[232] In 1972, Thomas Scanlon developed the "Millian principle" in which he outlined two types of harms that prove the negative effect of regulating citizens' speech.[233] These two harms are

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[226] *Id.*at 2-13.

[227] ENCYCLOPEDIA OF THE FIRST AMENDMENT 2, at 708 (John R. Vile et al. eds., 2009).

[228] *Id.*

[229] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-14–2-15 (2008).

[230] *Id.* at 2-15 (quoting Brandeis, J. in Abrams v. Unites States, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J. dissenting)).

[231] *Id.* at 2-16.

[232] ERIN K. COYLE, THE PRESS AND RIGHTS TO PRIVACY: FIRST AMENDMENT FREEDOM VS. INVASION OF PRIVACY CLAIMS 24 (2012).

[233]Thomas Scanlan, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972).

> (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consist merely in the fact that the act of expression left the agents to believe (or increased their tendency to believe) these acts to be worth performing.[234]

Consequently, Scanlon advocated for a government that could maintain authority over its citizens while affording them the freedom of expression.[235]

Similarly, in his 1977 article, "Scope of the First Amendment Freedom of Speech," Baker presented his "liberty model" based on the marketplace of ideas.[236] With "self fulfillment and and individual participation in change" at the center of the model, Baker felt citizens should have complete control over their expression.[237] Specifically, citizens should be free from "governmental or societal restrictions that limit individual autonomy."[238] However, Baker relied on Mills' rationale that the only time "power can be rightfully exercised over any member of a civilized community" is when that member's speech may harm others.[239] Anything else, according to Baker, is a violation of the social contract.[240]

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[234] *Id.* at 213.

[235] *Id.*at 214.

[236] ERIN K. COYLE, THE PRESS AND RIGHTS TO PRIVACY: FIRST AMENDMENT FREEDOM VS. INVASION OF PRIVACY CLAIMS 24 (2012).

[237] *Id.*

[238] *Id.*

[239] ERIN K. COYLE, THE PRESS AND RIGHTS TO PRIVACY: FIRST AMENDMENT FREEDOM VS. INVASION OF PRIVACY CLAIMS 24 (2012)(quoting JOHN STUART MILL, ON LIBERTY 13 (1956)).

[240] *Id.* The social contract was written by Jean-Jacques Rousseau in which he explained how the social contract was "civil religions-with their quasi-religious rituals, liturgies, collective

1. *New York Times v. Sullivan*

The marketplace of ideas theory was adopted by the U.S. Supreme Court and applied in their jurisprudence involving defamation claims. This is particularly true for the ruling in *New York Times Co. v. Sullivan*. In this case, Justice Brennan explicitly expressed his concern for keeping public issues available as topics for wide-open debate.[241] Applying the marketplace of ideas premise that truth will prevail through open conversation, Justice Brennan also indicated that citizens should be allowed to discuss public officials and public matters even if those conversations led to unpleasant thoughts and reactions.[242] It was this way of thinking that led the Court to afford greater protection to speech.[243] Specifically, in *New York Times Co. v. Sullivan*, the Court allotted greater protection to *The New York Times*, the publishing entity, by requiring Sullivan to prove the defamatory language was made with actual malice.[244] This heightened standard was a result of the court broadening the scope of the First Amendment to protect the press.[245]

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narratives, holidays, myths, heroes, symbols, and sacred places, as well as their empowering and galvanizing images, slogans, and principles-have become the cement of modern societies. They function to preserve "community" alongside "society." ENCYCLOPEDIA OF THE FIRST AMENDMENT 2, at 292 (John R. Vile et al. eds., 2009).

[241] *N.Y. Times Co.*, 376 U.S. at 270.

[242] *Id.*

[243] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-6 (Keith Voelker, 4th ed. 2010).

[244] *N.Y. Times Co.*, 376 U.S. at 270–80.

[245] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-6 (Keith Voelker, 4th ed. 2010).

In his 2015 article, "The Promises of *New York Times v. Sullivan*," David A. Anderson explains the effects of the *New York Times v. Sullivan* ruling.[246] Such effects are a result of the application of the marketplace of ideas theory. Anderson explains that the Court feared that limiting open debate would create a chilling effect on public conversation and public issues in an effort to avoid the accusation of defaming another's character.[247] This idea of creating an open atmosphere for public conversation is a direct application of the marketplace of ideas.[248] The ruling in *New York Times Co. v. Sullivan* provided the freedom to not only have the ability to "speak one's mind, but also the freedom to be informed about public issues."[249] This is a direct reflection of the value of the marketplace of ideas to let all ideas, thoughts, and speech be free in the marketplace and allow the truth to prevail.

Anderson explained how the *New York Times Co. v. Sullivan* expansion of the First Amendment also expanded the marketplace of ideas theory.[250] While the marketplace of ideas protects only ideas, Anderson believes *New York Times Co. v. Sullivan* extended protection to ideas *and* information.[251] Just as the marketplace of ideas theory recognizes a threat of authoritative censorship of ideas, Anderson believes the *New York Times Co. v. Sullivan* Court "invoked Madison's assertion that "the censorial power is in the people over the Government,

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[246] David A. Anderson, *The Promises of New York Times v. Sullivan*, 20 ROGERS WILLIAMS U. L. REV. 1, 2 (2015).

[247] *Id.*

[248] *Id.* at 21.

[249] *Id.*

[250] *Id.* at 23.

[251] *Id.*

and not in the Government over the people."[252] Plainly put, Anderson believes *New York Times Co. v. Sullivan* supports the people's voice, and their protection of speech, even in defamation cases, over that of government censorship.[253]

2. *Gertz v. Robert Welch*

Critics of the marketplace of ideas believe this theory is subject to the same pitfalls the economic marketplace succumbs to.[254] Just as the rich have greater access to and an increased level of participation in the economic marketplace, so to do they have the same increased access to and participation in the marketplace of ideas.[255] This is a direct parallel to the rationale the Court used in *Gertz v. Welch*.

Applying the marketplace of ideas theory, the ruling in *Gertz* distinguished public figures from private persons. The Court explained the first remedy to a defamatory statement is to "minimize [the statement's] adverse impact on reputation."[256] Because public officials and public figures have a much greater degree of access to communication outlets and a greater ability to reach the masses, they also have a greater ability to "minimize its adverse impact on reputation."[257] This access affords public officials and public figures greater protection from

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[252] David A. Anderson, *The Promises of New York Times v. Sullivan*, 20 ROGERS WILLIAMS U. L. REV. 1, 23 (2015) (quoting James Madison in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting 4 ANNALS. OF CONG. 934 (1974)) (internal quotation marks omitted).

[253] *Id.* at 23.

[254] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-16.1 (2008).

[255] *Id.*at 2-16.4.

[256] *Gertz*, 418 U.S. at 344.

[257] *Id.*

defamatory statements.[258] In contrast, a private person has less access to communication channels, thus having less ability to remedy the situation.[259] Consequently, private persons have a greater risk of injury when faced with defamatory statements.[260]

Because of *Gertz v. Welch*, states are now allowed to dismiss private plaintiffs from meeting the actual malice standard.[261] The plaintiff's burden of proof depends on the state in which litigation occurs because different states apply different standards.[262] According to Ruth Walden and Derigan Silver, "The best hope right now for reducing this confusion and ensuring that an appropriate balance is struck between protection of individual reputation and freedom of expression may be for the states to do it themselves."[263] Thirty-six states, including Louisiana, as well as the District of Columbia and Puerto Rico adopted negligence as the burden of proof for a private person claiming defamation.[264] States that do not use negligence as their plaintiff's standard found a middle ground somewhere between negligence and actual malice.[265]

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[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-2 (Keith Voelker, 4th ed. 2010).

[262] Ruth Walden & Derigan Silver, *Deciphering Sun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?* 14 COMM. L. & POL'Y 1, 39 (2009).

[263] *Id.*

[264] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-3–6-5 (Keith Voelker, 4th ed. 2010).

[265] *Id.* at 6-2.

3. *Rosenbloom v. Metromedia, Inc.*

In "Reconciling Theory and Doctrine in First Amendment Jurisprudence" by Robert Post, the author draws particular distinction to a significant shortfall of the Court.[266] The U.S. Supreme Court fails to bridge the gap between the marketplace of ideas and the First Amendment when their opinions do not explicitly explain that the truth-seeking function is concerned with social ideas.[267] To say the marketplace of ideas believes the First Amendment protects all speech is inaccurate.[268] The theory aims to protect speech "that communicates ideas and that is embedded in the kinds of social practices that produce truth."[269] Additionally, jurisprudence proves states do not allow abusive speech. The U.S. Supreme Court has afforded constitutional protection to speech that is "outrageous,"[270] "offensive,"[271] "exaggerated," "vilified,"[272] "indecent,"[273] hurts one's "dignity,"[274] or facilitates "aggression[275] and "personal assault."[276] This is particularly

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[266] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2366 (2000).

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

[271] *Cohen v. California*, 403 U.S. 15, 22 (1971).

[272] *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

[273] *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

[274] *Boos v. Barry*, 485 U.S. 312, 322 (1988).

[275] *Time, Inc. v. Hill*, 385 U.S. 374, 412 (1967) (Fortas, J. dissenting).

[276] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2370 (2000).

relevant to defamation law in that one simply cannot make any statement one wants, especially if the statement is false and one makes it negligently or knowingly with reckless disregard for the truth.[277]

This application of the marketplace of ideas is apparent in *Rosenbloom v. Metromedia, Inc.* when the Court looked at the questionable speech, itself, to determine if it rose to the level of defamation.[278] In his opinion, Justice Brennan held

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The Public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[279]

With this statement, Justice Brennan articulated citizens' right to know what issues are occurring in their communities and the press' constitutional right to report on those issues.[280] He wrote:

> We honor the commitment to robust debate on public issues, which is embodied in the First Amendment by extending constitutional protection to all discussions and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[281]

The Court feared placing too many restrictions on speech and the press would cause a chilling effect on public conversation and the press.[282] As a result, a private person with a

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[277] *Id.* at 2366.

[278] *Rosenbloom*, 403 U.S. at 43. In this case, the Court looked at the speech, itself, as opposed to examining person who said it and determining whether they were a public figure or private person.

[279] *Id.*

[280] *Id.*

[281] *Id.* at 43–44.

[282] *Id.* at 50.

defamation claim involving speech of public interest must meet the actual malice standard in order to recover.[283] This result was a significant shift from focusing on whether the plaintiff was a public official, public figure, or private person to whether the issue was one of public concern.[284]

C. Protection of Publications Through First Amendment Theory

Other theories that have contributed to First Amendment theory are the watchdog theory and the checking value theory. These theories grant greater protection to publications and are directly applicable to the law on defamation.

1. The Watchdog Theory

In 1974, Justice Potter Stewart addressed the watchdog theory in "Or of the Press."[285] This publication surfaced shortly after President Richard Nixon resigned from office following the Watergate scandal and brought with it a new theory surrounding the First Amendment.[286]

Justice Stewart examined the language of the First Amendment which states,[287] "Congress shall make no law…prohibiting the free exercise thereof; or abridging the freedom of

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[283] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-16 (Keith Voelker, 4th ed. 2010). Several justices, including Justice Harlan and Justice Marshall, did not agree with Justice Brennan's opinion. *Id.* To start, both justices felt a private person need only prove strict liability in order to recover for the harm he endured. *Id.* at 1-17. Both felt Justice Brennan's public interest standard left too much discretion to the court in determining what was "newsworthy" on a case by case basis. *Id.* Justice Marshall also believed Justice Brennan's public interest standard did not fully protect citizens from reputational harm, going against basic rights of human dignity. *Id.*

[284] *Rosenbloom*, 403 U.S. at 44. It is important to note that this was a plurality opinion. Because it was not a stronger, unanimous decisions, some states have chosen not to follow the standard.

[285] Vikram David Amar, *From Watergate to Ken Starr: Potter Stewart's or of the Press a Quarter Century Later*, 50 HASTINGS L.J. 711, 711 (1999).

[286] *Id.*

speech, *or of the press*."[288] He found a great deal of importance in the First Amendment language "or of the press."[289] Taking into account fifty years of First Amendment jurisprudence, Justice Stewart noticed the focus was on guaranteeing individuals' rights to free speech.[290]

Justice Stewart recognized a distinction between guaranteeing the free speech rights of individuals and the rights of "the press."[291] He criticized the previous jurisprudence for failing to consider the "Constitution's guarantee of a Free Press."[292] While the Court focused on individual rights guaranteed by the constitution, it failed to account for the rights of an institution. Justice Stewart believed the "or of the press" clause was a Constitutional protection granted to the institution of the press.

Justice Stewart explained how freedom of the press and freedom of expression are not synonymous.[293] Because the founders distinguished between granting freedom of expression and freedom of the press in the language of the First Amendment, Justice Stewart believed they had two different meanings.[294] In fact, Justice Stewart explained how freedom of the press extended beyond the freedom of expression that is guaranteed to all citizens under the First

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[287] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 632 (1975).
[288] U.S. CONST. amend. I (emphasis added).

[289] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 632 (1975).

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.* at 634.

[294] *Id.*

Amendment.[295] Freedom of the press allows the institution of the press to "serve as a neutral forum for debate, a "market place for ideas."[296] Further, he believed the press was created to serve as the "fourth institution" of the Government— to serve as a watchdog for the other three branches of Government; the executive, legislative, and judicial powers.[297] In the words of John Adams, "The liberty of the press is essential to the security of the state."[298] As a result, the press is "the only organized private business that is given explicit constitutional protection."[299]

2. The Checking Value

In 1977, Professor Vincent Blasi of the University of Michigan published "The Checking Value in First Amendment Theory."[300] He maintained "that free expression has value in part because of the function it performs in checking the abuse of official power."[301]

The checking value holds that abuse of power by public officials is a far greater abuse than that by private individuals.[302] Blasi believed that public officials' abuse of power had a greater impact on government and, in turn, on individual citizens.[303] Furthermore, public officials

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[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.* (quoting John Adams).

[299] *Id.* at 633.

[300] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 521 (1977).

[301] *Id.* at 523.

[302] *Id.* at 538.

[303] *Id.*

have more power to check on private persons, creating a one-way flow of information.[304] The checking value allows the press to "check" public officials and reduce government misconduct.[305] The checking value assumes public officials will conduct their business in a more fair manner because their actions are reported by the press.[306] Blasi was adamant in explaining that the checking value was meant to supplement other First Amendment theories, not replace them.[307]

3. Effect on the Law on Defamation

The landmark Supreme Court rulings of *New York Times Co. v. Sullivan*,[308] *Curtis v. Butts*,[309] *Rosenbloom v. Metromedia, Inc*,[310] and *Gertz v. Welch*,[311] occurred prior to the development of the checking value[312] and watchdog[313] theories. Nonetheless, it is clear the

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[304] *Id.* at 539.

[305] *Id.* Eliminating government misconduct is based on the belief that government misconduct leads to government decision-making. *Id.* at 542.

[306] MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARY 11 (2001).

[307] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (1977).

[308] *New York Times Co. v. Sullivan* was decided in 1964. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[309] *Curtis Publishing Co. v. Butts* was decided in 1967. *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

[310] *Rosenbloom v. Metromedia* in 1971. *Rosenbloom*, 403 U.S. at 43.

[311] *Gertz v. Robert Welch* was decided in 1974. *Gertz*, 418 U.S. at 344.

[312] Published by Professor Vincent Blasi in 1977. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (1977).

[313]Published by Justice Potter Stewart in 1975. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 632 (1975).

foundations for the theories were greatly influenced by the preceding Court rulings. Consequently, the theories are directly related to the law on defamation.

For example, Justice Stewart's conception of First Amendment protection for the press relied on the actual malice standard asserted by the Court in *New York Times v. Sullivan*, *Curtis Publishing Company v. Butts*, and *Rosenbloom v. Metromedia, Inc.*[314] Justice Stewart explained how this group of cases forced the U.S. Supreme Court to take a step away from the free speech rights of individuals, and examine the free speech rights of the press.[315] Examining the "limits imposed by the free press guarantee upon a state's common or statutory law of libel," the Court declared a public figure must prove actual malice on behalf of the publisher to succeed in a defamation suit.[316] The rulings in these landmark cases were a direct influence on the watchdog theory. The expanded protection afforded to the press by the Court was adopted by Stewart in his theory of affording institution-wide First Amendment protection to the publishing industry.[317]

Additionally, Blasi suggests that the whole premise of punishing those for defamation is directly related to the checking value.[318] Historically, defamation was a tactic "used by tyrants to silence potentially influential critics."[319] The First Amendment protects speech against public officials because "some form of systematic scrutiny of officials seems necessary in light of the

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[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.* at 633.

[318] Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 575 (1977).

[319] *Id.*

tyrannical possibilities opened up by the pervasiveness of technological resources of modern government."[320] Blasi associates the checking value with this line of thought.[321] Checking public officials to ensure they steer clear of government misconduct offers potential for suppressing tyrannical behavior.

Maintaining actual malice as the standard to recover punitive damage awards against a public official or public figure supports the Court's concern with granting excessive damage awards in a defamation case.[322] The *Gertz v. Welch* ruling states, "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."[323] Consequently, the Court struggled with balancing the need to keep excessive damage awards in check while still compensating the injured party.[324] Blasi suggested the checking value could eliminate this battle. By applying the checking value toward the public official, the Court can develop a better rationale when deciding the degree to which courts must limit damage awards in a defamation suit.[325] Blasi believes "the checking value is concerned not with the general process of selecting the best person for office but with the narrower task of preventing abuses of the public trust."[326]

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[320] *Id.*

[321] *Id.*

[322] *Id.* at 577.

[323] *Id.* at 249.

[324] *Id.* at 577.

[325] *Id.*

[326] *Id.* at 584.

Professor Blasi acknowledges the limited use of the checking value by the Supreme Court. He believes that applying the theory "would improve the process of doctrinal formulation" for the First Amendment.[327] The more informed the public is, the less likely a public official is to misbehave, and the less likely a defamatory claim will arise. While the checking value centers around public officials and this thesis focuses on athletes (not public officials), it is still useful in developing answers to the questions at hand.

[327] *Id.* at 581.

CHAPTER 4: RESEARCH QUESTIONS

RQ 1: Can a NCAA collegiate athlete bring a defamation claim against a media entity as the defendant?

RQ 2: If a NCAA collegiate athlete were to bring a defamation claim against a media entity, how would the court classify the collegiate athlete — as a private person or a public figure?

RQ 3: Can a NCAA collegiate athlete bring a defamation claim against a non-media entity as the defendant? For example, if a non-media Twitter user publishes a defamatory tweet, can the collegiate athlete sue that user for their online publication?

RQ 4: What burden of proof would the NCAA collegiate athlete have to meet to prove defamation on the part of the defendant — negligence or actual malice?

CHAPTER 5: METHODS

This thesis relied on landmark defamation cases from the U.S. Supreme Court — *New York Times v. Sullivan*, *Curtis v. Butts*, *Rosenbloom v. Metromedia, Inc.*, and *Gertz v. Robert Welch*. Within the realm of legal research, the law, itself, is considered a primary source.[328] Primary sources are afforded greater weight by the courts because they are considered "the actual source of the law."[329]

The cases were gathered using LexisNexis. LexisNexis is a legal research database.[330] LexisNexis is one of the most popular legal research databases.[331] For the purpose of this thesis, LexisNexis was used to identify and sift through court rulings by appellate and trial courts in the fifty states, the District of Columbia, and federal courts.

The searches were performed using boolean keyword searches. Boolean searches use "boolean logic," a "mathematical formula…[that can] "read" specific words and symbols (called "operators") to help narrow our searches."[332] The keyword searches used by this author in the database consisted of:

"defamation" + "supreme court"
"defamation" + "first amendment"
"defamation" + "public figure"
"defamation" + "public official"
"defamation" + "private person"

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[328] STEPHEN ELIAS, LEGAL RESEARCH: HOW TO FIND & UNDERSTAND THE LAW 23 (Janet Portman, 15th ed. 2009).

[329] *Id.*

[330] LEXISNEXIS, http://www.lexisnexis.com/en-us/about-us/about-us.page (last visited Oct. 27, 2016).

[331] STEPHEN ELIAS, LEGAL RESEARCH: HOW TO FIND & UNDERSTAND THE LAW 41 (Janet Portman, 15th ed. 2009).

[332] *Id.* at 31.

"defamation" + "athlete"

Those rulings were read to determine how the applied categories initially developed in precedent-setting rulings by the U.S. Supreme Court, which is considered the highest court in the land.[333]

The U.S. Supreme Court cases that this thesis cites as setting precedents – *New York Times Co. v. Sullivan*, *Curtis v. Butts*, *Rosenbloom v. Metromedia, Inc.*, and *Gertz v. Robert Welch* – created the foundation for defamation law surrounding the First Amendment.[335] In these landmark cases, the Court created categories in which to place the defamation plaintiff to classify them as either a public official, public figure, or private person.[336] Additionally, the cases provide the standard the plaintiff must meet, depending on their classification, in order to recover damages from a defamatory statement.[337] The requirements outlined by the Court in these cases and subsequent citing cases will guide the conversation in determining into which category a student-athlete falls and what would be the appropriate level of fault if a student-athlete were to bring a defamation claim.

[333] *Id.* at 182. Precedent means, once the U.S. Supreme Court makes a decision on a question of law, subsequent cases with the same question of law are to be decided in the same manner. *Id.*

[335] *See*, ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-2–1-25 (Keith Voelker, 4th ed. 2010).

[336] *See*, *Id.* at 1-4; *Id.* at 1-10; *Id.* at 1-17.

[337] *See*, *Id.* at 1-4; *Id.* at 1-10; *Id.* at 1-17.

CHAPTER 6: ANALYSIS

"Defining a public figure is like trying to nail a jellyfish to the wall."[338]

With an in-depth understanding of the cornerstone U.S. Supreme Court cases on defamation as well as the underlying communications theories, one can begin to answer the questions surrounding defamation and how it pertains to NCAA student-athletes.

A. NCAA Student-Athletes and Their Ability to Bring a Defamation Claim

The short answer to the inquiry of whether a NCAA collegiate athlete can bring a defamation claim against a media entity is "yes." Under the U.S. Constitution Article IV, section 2, paragraph 1, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[339] In other words, a basic right of all citizens is the right to bring suit in a court of law.[340] *Chambers v. Baltimore & O.R. Co*. expanded upon this paragraph when it explained

> In an organized society [the right to sue] is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens.[341]

Just because a citizen *can* sue, however, does not necessarily mean the action is warranted nor does it guarantee success. In order for any plaintiff to assert a defamation claim–whether the

[338] *Rosanova v. Playboy Enters.*, 411 F.Supp 440, 443 (1976).

[339] U.S. CONST. art. IV, §2, cl. 1.

[340] *Chambers v. Balt. & O.R. Co*., 28 S. Ct. 34 (1907).

[341] *Id.*

plaintiff be a NCAA student-athlete or a typical citizen–the plaintiff must prove the prima facie case of defamation.

1. The Prima Facie Case

According to *Black's Law Dictionary*, a prime facie case is, "A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor."[342] Put plainly, the party must meet the elements of defamation to determine if there is warranted opportunity to recover for the alleged defamatory statement.

The first element of the prima facie case is that the plaintiff must prove the statement was published.[343] "Published" means "to distribute copies (of a work) to the public. To communicate (defamatory words) to someone other than the person defamed."[344] Further, the publication must be done in a manner that is accessible to a third party.[345] The plaintiff must also prove the statement "cause[s] damage to someone's good name or reputation."[346]

Next, the statement must be false in order for it to be defamatory.[347] Historically, the defendant was responsible for proving falsity.[348] The U.S. Supreme Court first examined falsity

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[342] *Prima Facie*, BLACK'S LAW DICTIONARY 1382 (10th ed. 2014).

[343] Stephen G. Strauss, *Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 52 (1996) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th Ed. 1984)).

[344] *Publish*, BLACK'S LAW DICTIONARY 1428 (10th ed. 2014).

[345] Stephen G. Strauss, *Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 52 (1996).

[346] *Id.*

[347] ROBERT TRAGER ET. AL, THE LAW OF JOURNALISM AND MASS COMMUNICATION 173 (5th ed. 2016).

[348] *Id.*

and issues of public concern in *Philadelphia Newspaper v. Hepp*s and *Snyder v. Phelps*. In *Philadelphia Newspaper v. Hepp*s, the burden shifted from the original stance of the defendant proving falsity to the plaintiff proving falsity when it involves an issue of public concern. [349] However, since the Court first examined falsity in *Philadelphia Newspaper v. Hepp*s, the burden has shifted to the plaintiff proving falsity in a defamation suit.[350]

a. Defamation, Matters of Public Concern, and Falsity

The seminal case for falsity as it pertains to issues of public concern is *Philadelphia Newspaper v. Hepps*. [351] In this case, Maurice S. Hepps and General Programming, Inc. (GPI) sued the *Philadelphia Newspaper, Inc*. for defamation.[352] GPI was a corporation that franchised convenient stores named "Thrifty."[353] Hepps was a principal stockholder in GPI.

Between May 1975 and May 1976, the *Philadelphia Inquirer*–owned by GPI–published five articles accusing Hepps and GPI of having ties to Mafia figures.[354] *The Philadelphia Inquirer* further accused Hepps and GPI of using those ties to influence legislative and administrative processes within Pennsylvania's government.[355] Specifically, the articles stated a state legislator was "a Pittsburgh Democrat and convicted felon…[who exemplified] a clear

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[349] *Phila. Newspaper v. Hepps*, 475 U.S. 767, 775 (1986).

[350] ROBERT TRAGER ET. AL, THE LAW OF JOURNALISM AND MASS COMMUNICATION 173 (5th ed. 2016).

[351] *Phila. Newspaper v. Hepps*, 475 U.S. 767, 775 (1986).

[352] *Id.* at 768.

[353] *Id.* at 769.

[354] *Id.*

[355] *Id.*

pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty."[356] The articles also stated Thrifty "won a series of competitive advantages through rulings by the State Liquor Control Board," launching an investigation "between the Thrifty chain and known mafia figures."[357]

The U.S. Supreme Court provided two factors to determine a defamation case.[358] The first was whether the plaintiff was a public official, public figure or a private person.[359] The second was whether the alleged defamatory speech was a matter of public concern.[360]

The Court declared matters of public concern demand greater constitutional protection to inform and protect the public.[361] For example, allegations of criminal activity are matters of public concern. *New York Times v. Sullivan* only required a public official know falsity in order to recover in a defamation suit on matters of public concern.[362] However, *Phildelphia Newspaper v. Hepps* expanded upon this, requiring a private person plaintiff also show the alleged defamatory statement as false when it is a matter of public concern.[363] In this case, Hepps was a

[356] *Id.*

[357] *Id.*

[358] *Id.* at 775.

[359] *Id.*

[360] *Id.*

[361] *Id.*

[362] *Id.*

[363] *Id.*

private person, but allegations of criminal activity are a matter of public concern.[364] Therefore, Hepps had to prove the statements made by the *Philadelphia Inquirer* were false.[365]

The Court implemented this standard of law to prevent a chilling effect.[366] Falsity is a required element because "to do otherwise could only result in a deterrence of speech which the Constitution makes free."[367] The Court understands that circumstances vary, preventing the demonstration of the falsity of some defamatory statements, but this is a downfall the Court is willing to overlook in order to protect the First Amendment.[368] Consequently, greater First Amendment protection is granted to matters of public concern.[369]

Another relevant notable case is *Snyder v. Phelps.* In 2011, the U.S. Supreme Court explicitly defined "issue of public concern" following the picketing demonstration by Westboro Baptist Church (Westboro) near Marine Lance Corporal Matthew Snyder's funeral.[370]

Killed in action, Marine Lance Corporal Matthew Snyder's funeral was to be held at a Catholic Church in Westminster, Maryland.[371] Ater the funeral arrangement was published in the local newspaper, five members from Westboro decided to picket the memorial service "on public

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[364] *Id.* at 777.

[365] *Id.*

[366] *Id.* (internal quotation marks omitted).

[367] *Id.* at 777.

[368] *Id.* at 778.

[369] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 3-11 (Keith Voelker, 4th ed. 2010).

[370] *Snyder v. Phelps*, 562 U.S. 443, 448 (2011).

[371] *Id.* at 448.

land adjacent to public streets near the Maryland State House, the United States Naval Academy, and Matthew Snyder's funeral."[372] Westboro held signs that said "God Hates the USA/Thank God for 9/11," "America is Doomed, "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates you."[373] Their picketing was seen by the passing funeral procession and aired on the local news station.[374]

Following the funeral, Matthew Snyder's father, Albert Snyder (Snyder) sued Westboro for defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.[375] Snyder won on the intentional infliction of emotional distress claim receiving over $2 million in punitive damages.[376]

Appealing to the U.S. Supreme Court, the verdict was reversed in favor of Westboro.[377] The Court declared "Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric."[378]

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[372] *Id.*

[373] *Id.*

[374] *Id.* at 449.

[375] *Id.*

[376] *Id.* at 450. Note, in this case, the District Court awarded Phelps' summary judgment on the defamation claim. However, the U.S. Supreme Court only addressed the intentional infliction of emotional distress and intrusion and civil conspiracy. Nonetheless, the definition of public concern is relevant to First Amendment protection in defamation claims. *Id.*

[377] *Id.* at 459.

[378] *Id.* at 450–451.

The justices also used this case as an opportunity to define what constitutes an issue of public concern.[379] Quoting *Garrison v. Louisiana*, the Court said "speech concerning public affairs is more than self-expression; it is the essence of self-government."[380] As such, speech of public concern warrants greater First Amendment protection.[381] The Court said

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[382]

In contrast, a matter of private concern, as seen in *Dun & Bradstreet* does not demand the same level of constitutional protection.[383] Speech of private matters does not have the same degree of First Amendment protection as speech of public concern "because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest."[384]

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[379] *Id.* at 451–452.

[380] *Id.* at 452. Note, *Garrison v. Louisiana* was a criminal defense case in which Robert Paul Garrison attempted to quash a DWI offense on the grounds that "Officer Sasser had no jurisdiction off campus and even if he did, he did not have a reasonable basis to stop defendant." *State v. Garrison* 911 So.2d 346, 348 (2005). The Court held, "The law permits police to seek the voluntary cooperation of the public in the investigation of a possible crime. An officer does not violate the prohibition against unlawful seizures by requesting that an individual give information or cooperation in the investigation or prevention of a crime. Such voluntary inquiries are vital in police investigatory work." *State v. Garrison* 911 So.2d 346, 349 (2005).

[381] *Snyder*, 562 U.S. at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983)).

[382] *Id.* at 453 (quoting *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983)).

[383] *Id.* at 453.

[384] *Id.* at 451–452.

The Court ruled in favor of Westboro because issues surrounding the state of the United States, the military, homosexuality, and scandals of religion are, in fact, matters of public concern.[385] Consequently, discussion of such issues deserves greater First Amendment protection.[386]

Issues of public concern encompass a broad area of speech. As it pertains to the questions at hand regarding NCAA student-athletes and defamation, it is important to classify speech as addressing matters of public or private concern because each situation involving a student-athlete will vary in fact. Some instances may examine alleged defamatory statements that have no connection to athletes or their performance in any way. However, the statement in question may still rise to the level of being an issue of public concern. In other words, the language may not pertain to the student-athlete's performance on the playing field but may still be items that are newsworthy. For example, if the statement pertains to an athlete and criminal activity, it is likely a matter of public concern.[387]

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[385] *Id.* at 454.

[386] *Id.* at 458.

[387] *See, e.g.*, *Philadelphia Newspapers*, 475 U.S. at 776 (finding that newspaper articles addressing allegations of criminal conduct by private figures were matters of public concern). In "Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test," author Stephen G. Strauss compared *Holt v. Cox Enterprise* to a situation surrounding former University of Miami football player, James Stewart, and his battle with the *New York Times* to determine if off-the-field conduct is actionable in a defamation claim. Stephen G. Strauss, *Defamation and the Collegiate Athlete: The Case of Failed Reporting and an NFL Drug Test*, 33 SPORTS LAW. J. 51, 56 (1996). Strauss believed Stewart's case is distinguishable from *Holt v. Cox Enterprise* in that the alleged defamatory statement did not concern Stewart's activity on the field. Strauss believes Stewart can argue that although he is a public figure due to his presence and activity on a high profile collegiate football team (Stewart actively worked to be a starter on Alabama's football team), the drug test at the center of the alleged defamatory statement falls within a private realm of his life. *Id.* at 58. However, a drug test does still relate to whether an athlete can play. Further, illegal drug use is a crime. Strauss does not address this fact, but, instead, considers a drug test to be something private. *Id.*

Exclusive to the above elements of defamation is the additional element of actual malice.[388] Actual malice is a further requirement that must be met if the plaintiff is deemed a public figure or public official.[389] Actual malice was established in *New York Times v. Sullivan*.[390] The Court defined actual malice as "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not."[391] If the plaintiff is deemed a private person, the plaintiff need only prove the statement was made with negligence.[392]

b. The Big Picture

Synthesizing, in order for a NCAA student-athlete to bring a defamation claim, the student-athlete must:

i. Prove the alleged defamatory statement was published in a manner accessible to a third party[393]
ii. Prove the alleged defamatory statement "cause[s] damage to someone's good name or reputation."[394]

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[388] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-25 (Keith Voelker, 4th ed. 2010).

[389] *Id.* at 1-26–1-27.

[390] *Id.* at 1-13.

[391] *Id.* at 1-25. Note, whether the NCAA student-athlete would be deemed a public or private figure is addressed subsequently in this publication.

[392] A plaintiff considered a private person by the court in a defamation case is to adopt the burden of proof set forth by that particular state "so long as it does not provide for liability without 'fault.'" *Id.* at 6-2 (quoting *Gertz*, 418 U.S. at 347). Thirty-six states, including Louisiana, the District of Columbia, and Puerto Rico adopted negligence as the burden of proof for a private person claiming defamation. *Id.* at 6-3–6-5.

[393] Stephen G. Strauss, *Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 52 (1996) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th Ed. 1984)).

iii. Prove the alleged defamatory statement is false if it involves a matter of public concern[395]
iv. Prove the defendant's negligence or actual malice in making the statement.[396]

If the student-athlete meets the above elements, it is likely the athlete has a viable claim to bring against the defendant.[397] Nonetheless, no case law was found pertaining to defamation of a current student-athlete.

2. Holt and the College Athlete Case

While no case law was found in which a current NCAA student-athlete brought a defamation claim against a media-entity or similar defendant, there is, however, litigation in which a former NCAA student-athlete sued for defamation after completion of his collegiate career.[398]

Holt v. Cox Enterprise provides the closest example of a defamation case brought by a NCAA student-athlete.[399] In November of 1961, the University of Alabama ("Alabama") and Georgia Tech competed in a "highly publicized football game."[400] In the fourth quarter,

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[394] *Id.*

[395] ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* 2-7 (Keith Voelker, 4th ed. 2010).

[396] Note, the standard is determined by whether the plaintiff is considered a public figure or private person

[397] A viable claim does not mean they will win. It simply means the claim is not frivolous.

[398] *Holt*, 590 F. Supp. at 408.

[399] Holt did not bring the case until many years after completing his involvement in the NCAA.

[400] *Holt*, 590 F. Supp. at 409.

Alabama's Darwin Holt hit Georgia Tech's Chick Graning.[401] Graning suffered several injuries.[402] When officials did not call a penalty against Holt, a national conversation about the hit began.[403] Although Holt, did not comment on the issue at the time, many journalists published articles on the incident.[404]

Years later, Holt participated in an interview with *The Tuscaloosa News* resulting in a series of five articles published in the *Sunday Atlanta Journal and Constitution*.[405] The articles revisited the famous hit.[406]

Over 20 years after the initial hit, Holt sued Cox Enterprises, Inc., for libel[407] and invasion of privacy.[408] The U.S. District Court for the Northern District of Georgia found the published statements about Holt referred to his experience as a college athlete and injured his

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[401] *Id.* at 410.

[402] *Id.*

[403] *Id.*

[404] *Id.* Holt did not publically comment on the hit at the time but did so prior to bringing suit in 1984 claiming the hit was, in fact, legal.

[405] *Id.* The articles were written by Darrell Simmons, defendant to the action. The fact that Holt commented on the incident is a significant element in determining if Holt is a public figure or private person under defamation law. Following *Gertz v. Robert Welch, Inc.*, whether the plaintiff "thrust himself or his views into public controversy to influence others" was a significant element in determining if the plaintiff was a public figure or private person for purposes of a defamation claim." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-35 (Keith Voelker, 4th ed. 2010) (quoting *Gertz*, 418 U.S. 345 (1974).

[406] *Holt*, 590 F. Supp. at 411.

[407] Libel is "written or visual defamation." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 2-10 (Keith Voelker, 4th ed. 2010).

[408] *Holt*, 590 F. Supp. at 408.

reputation to the degree of rising to defamation.[409] The court deemed Holt a limited-purpose public figure:[410]

> As a member of the Alabama football team, Holt voluntarily played that sport before thousands of persons---spectators and sportswriters alike---and he necessarily assumed the risk that these persons would comment on the manner in which he performed. The defamatory comments in the articles relate solely to Holt's play on the field and are thus within the limited range of issues upon which Holt invited comment.[411]

Finding he was a limited-purpose public figure escalated the plaintiff's burden of proof to that of proving "actual malice."[412] This standard provided more protection to the media against being

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[409] *Id.* at 411.

[410] In a defamation case, the court will consider the plaintiff either a public figure or a private person. In *Gertz v. Robert Welch, Inc.*, the court defined a public figure as, "those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," and a limited-purpose public figure as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-33–1-34 (Keith Voelker, 4th ed. 2010) (quoting *Gertz*, 418 U.S. at 345). *New York Times v. Sullivan* declared public officials must prove actual malice in order to meet their burden of proof in defamation cases. *Id.* at 1-36 (citing *N.Y. Times Co.*, 376 U.S. at 285–286). Actual malice was established in *New York Times v. Sullivan*. *Id.* at 1-13. The Court defined actual malice as, "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not." *Id.* at 1-25 (quoting *N.Y. Times Co. v. Sullivan* 376 U.S. 254). In contrast, a plaintiff considered a private person by the court in a defamation case is to adopt the burden of proof set forth by that particular state "so long as it does not provide for liability without 'fault.'" *Id.* at 6-2 (quoting *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 347 (1974)). Thirty-six states, including Louisiana, the District of Columbia, and Puerto Rico adopted negligence as the burden of proof for a private person claiming defamation. *Id.* at 6-3–6-5.

[411] *Holt*, 590 F. Supp. at 412.

[412] *Id.* at 412-13. *See also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-13 (Keith Voelker, 4th ed. 2010). Actual malice was established in *New York Times v. Sullivan. Id.* at 1-13. The Court defined actual malice as, "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not." ROBERT D. *Id.* at 1-25 (quoting *N.Y. Times Co. v. Sullivan* 376 U.S. 254 (1964)).

held liable for harming the reputation of public figures on a matter of public concern.[413] Unable to prove actual malice, Holt did not recover damages.[414]

Relevant to the question at hand, Holt is an example of a collegiate athlete bringing a defamation claim. Because Holt was a student-athlete and brought the defamation claim surrounding his actions as a student-athlete, this case supports the notion that a student-athlete *can* bring a defamation claim against a media entity. However, something the student-athlete should be cognizant of is the statute of limitations for defamation claims within one to three years of publication of the defamatory statement.[415]

If the athlete does not bring the defamation claim within one to three years, depending on the specific jurisdictional rules, the athlete is barred from ever bringing the claim. Holt was able

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[413] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-30–1-31 (Keith Voelker, 4th ed. 2010) (quoting *N.Y. Times Co. v. Sullivan* 376 U.S. 254).The justices understood the difficulty in a journalist's job of trying to report to the public while still trying to quote speakers verbatim. *Id.* "So long as the gist of a quotation is correct, errors that do not materially change the meaning of the statement do no constitute "actual malice" even when they are made deliberately." *Id.*

[414] *Holt*, 590 F. Supp. at 413.

[415] Most states have a one to two year statute of limitations period. ROBERT H. PHELPS & E. DOUGLAS HAMILTON, LIBEL: RIGHTS, RISKS, RESPONSIBILITIES 102 (1966). The statute of limitations is one year in "Alabama, Arizona, California, Colorado, District of Columbia, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming." *Id*. at 102. The statute of limitations is two years in "Alaska, Connecticut, Florida, Idaho, Indiana, Iowa, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, North Dakota, South Carolina, South Dakota, Washington and Wisconsin." *Id*. at 102. A three year statute of limitations is applied in "Arkansas, Delaware, New Mexico and Vermont." *Id*. at 102. According to *Black's Law Dictionary*, "statute of limitations" is "[a] law that bars claims after a specified period…a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). The purpose of such a statute is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh." *Statute of Limitations*, BLACK'S LAW DICTIONARY 1636 (10th ed. 2014).

to sue Cox Enterprises over 20 years after the initial report because it resurfaced in the *Tuscaloosa News* interview that resulted in the five articles published in the *Sunday Atlanta Journal and Constitution*.[417]

Since Holt was allowed to sue for defamation, a student-athlete can likely file a defamation lawsuit so long as the student-athlete remains within the confines of the NCAA rules, regulations, and within statutory limitations.

3. Current Literature

In "Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test," published in the *Sports Lawyers' Journal*, addresses similar issues as the study at hand,[418] Stephen G. Strauss attempts to answer the question of whether statements made in regard to student-athletes' off the field activities–sexual orientation, domestic violence, and marital problems–are defamatory.[420] Strauss questioned whether such statements are actionable.[421]

To attack questions surrounding student-athletes and defamation, Strauss compared *Holt v. Cox Enterprise* to a situation surrounding former University of Miami football player, James

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[417] *Holt*, 590 F. Supp. at 410. The articles were written by Darrell Simmons, defendant to the action. The fact that Holt commented on the incident is a significant element in determining whether Holt is a public figure or private person under defamation law. Following *Gertz v. Robert Welch, Inc.*, whether the plaintiff "thrust himself or his views into public controversy to influence others" was a significant element in determining if the plaintiff was a public figure or private person for purposes of a defamation claim." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-35 (Keith Voelker, 4th ed. 2010) (quoting *Gertz*, 418 U.S. 345 (1974).

[418] Stephen G. Strauss, *Defamation and the Collegiate Athlete: The Case of Failed Reporting and an NFL Drug Test*, 33 SPORTS LAW. J. 51, 51 (1996).

[420] *Id*. at 51–52.

[421] *Id*.

Stewart, and his battle with the *New York Times*.[422] James Stewart was a running back on the University of Miami football team.[423] He entered the National Football League (NFL) draft in January of 1995.[424] While at a NFL scouting combine, Stewart submitted to a urinalysis testing his urine for the presence of drugs.[425] Although Stewart tested negative for any traces of drugs in his system, the *New York Times* published "Sapp Fails Drug Test at NFL Combine" reporting that James Stewart tested positive for marijuana.[426] With no retraction from the *New York Times*, Stewart sued the *New York Times* for defamation.[427] Strauss, however, failed to give a bright line answer in his analysis.

Strauss analyzed whether Stewart would be deemed a public figure or private person.[428] Strauss says that declaring Stewart a public figure is left to the will of the court.[429] However, if Stewart is declared a public figure by the court his claim may be deemed non-actionable because the public figure status affects the *New York Times*' ability to assert First Amendment privilege.[430] Further, if declared a public figure, Stewart would also have to prove actual malice

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[422] *Id*. at 56.

[423] *Id*. at 54.

[424] *Id*.

[425] *Id*.

[426] *Id*. at 54–55. Note, this article also addressed Warren Sapp.

[427] *Id*. at 55.

[428] *Id*.

[429] *Id*. at 56.

[430] *Id*.

on behalf of the *New York Times* whereas if Stewart is deemed a private person, he need only prove negligence.[431]

Comparing Stewart's case to Holt's, Strauss drew similarities between the two athletes in that they were both members of collegiate football teams and the topic of conversation and articles surrounding the game.[432] However, Strauss believed Stewart's case was distinguishable from *Holt v. Cox Enterprise* in that the alleged defamatory statement did not concern Stewart's activity on the field.[433] Instead, the article centered around Stewart's off-the-field conduct—a drug test.[434] Additionally, the drug test occurred after Stewart's collegiate career, but before his NFL career. Strauss asserted that Stewart could argue that although he is a public figure due to his presence and activity on a high profile collegiate football team (Stewart actively worked to be a starter on Alabama's football team), the drug test at the center of the alleged defamatory statement falls within a private realm of his life.[435]

By examining the *Holt v. Cox Enterprise* case and a situation surrounding former University of Miami football player, James Stewart, Strauss concluded that determining whether the athlete will be considered a public figure or private person is left to the discretion of the court

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[431] *Id*. at 56–57.

[432] *Id*. at 58.

[433] *Id*. While the argument is made that Stewart's case is distinguishable from *Holt* in that the alleged defamatory statement did not concern Stewart's activity on the field, a drug test does still relate to whether an athlete can play. Strauss does not address this fact, but, instead, considers a drug test to be something private. [433] *Id*.

[434] *Id*.

[435] *Id*.

on a case-by-case basis.[436] Courts have not given an umbrella determination declaring all athletes public figures.[437] The courts tend to determine this on the facts of each individual case.[438] However, using *Holt* as a foundation, an athlete can draw similarities and distinctions between their status as a public figure or private person using the facts of Holt being declared a public figure.[439]

Noticeable of the relevant case law and literature is the fact that in both instances, the plaintiffs did not bring a cause of action until they were *former* NCAA student-athletes. With no case law on current NCAA student-athletes bringing defamation claims against media entities, this thesis asks "why?" Are athletes contracting away certain rights when joining the NCAA?

4. NCAA Rules & Regulations

The final issue regarding student-athletes' ability to bring a defamation claim is the question of whether NCAA student-athletes contract out of their rights to sue. When an athlete joins a NCAA collegiate athletic team, the student-athlete enters into an "at will" agreement.[440] This means the athlete and university enter into a legal agreement "subject to one's discretion"

[436] *Id*. at 53–54.

[437] *Id*.

[438] *Id*.

[439] *Id*. at 58

[440] Alfred Dennis Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 St. Louis U.L.J. 39, 51 (1990).

that is "able to be terminated or discharged by either party without cause."[441] Both parties must enter into the agreement voluntarily.[442] Neither can compel the other to do so.[443]

For that athlete to be a part of the athletic program, however, the athlete must meet three requirements. [444] The athlete must "meet minimal academic entrance standards, become a student at the university, and qualify as an amateur."[445] According to the NCAA, the principal of amateurism states:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[446]

If the athlete does not meet these three requirements, the university is not allowed to associate with the athlete whatsoever.[447]

Upon entering into this agreement, the student-athlete agrees to comply with the regulations of the university in line with the NCAA compliance regulations.[448] Using the

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[441] *At Will*, BLACK'S LAW DICTIONARY 155 (10th ed. 2014).

[442] Alfred Dennis Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 St. Louis U.L.J. 39, 51 (1990).

[443] *Id*.

[444] *Id*.

[445] *Id*.

[446] *See*, NCAA DIVISION I MANUAL, CONST. § 2.9.

[447] Alfred Dennis Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 St. Louis U.L.J. 39, 51 (1990).

[448] *Id*.

Louisiana State University Compliance paperwork as a guide,[449] the athlete must agree to the terms of the compliance paperwork. In doing so, the student-athlete agrees to a "media release statement" in which the athlete

> Grant[s] permission for all sports contests, practices, news conferences and other related events in which I participate or for which I am present as a student-athlete of LSU (collectively referred to as "Events" to be broadcast, re-broadcast or otherwise transmitted and distributed, in whole or in part, on television, by internet and by any other means (collectively referred to as "Broadcasts"). I acknowledge and agree that the copyright to each Broadcast will initially vest in the broadcaster of each such Event, and that each broadcaster and its assignees and licensees will have and enjoy non-exclusive, transferable, perpetual right to use (and to license and sub-license, without limitation) any such Broadcasts. I also acknowledge and agree that LSU, the Southeastern Conference (SEC), the NCAA and each broadcaster may use my picture and name to promote and publicize LSU, the SEC, and the NCAA and their carious sports contests, practices, news conferences and other related sports events (including in programs, media guides, television spots and other media) and for other news and information purposes.[450]

However, there is no language within the contract that prohibits a student-athlete from bringing a defamation claim.[451]

The student- athletes do, however, sign a "Social Networking Responsibility Statement."[452] The statement holds the student-athlete responsible for posting any posts which may be in violation of LSU's policies and the student code of conduct.[453] Posting content of alcohol, illegal drugs, profanity, hazing, discriminatory content, or sexually explicit activity may

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[449] Note, this is the paperwork of one university and one athlete.

[450] Memorandum from Louisiana State University Compliance on Student-Athlete Packet, 7 (Academic Year 2012-2013) (on file with author).

[451] *Id*.

[452] *Id*. at 16.

[453] *Id*.

result in disciplinary action.[454] This rule is enforced because social media content is readily available to the general public and "may have implications for your personal safety and image, the image of your teammates and coaches, and the image of LSU, as well as future career and professional opportunities."[455]

The social networking responsibility statement also provides recommended guidelines for social media behavior explaining "any text or photo posted on a social networking site is no longer your property alone and what can be done with it is out of your control."[456] The guidelines suggest their posts be carefully monitored so as to best protect themselves, their family, and the university.[457] Furthermore, the statement explains any post made by the student-athlete has the potential to be seen by future employers, affecting their job prospects in the future.[458] Finally, to monitor student-athlete activity, the student-athlete is required to register with U-Diligence.[459]

Despite the Social Networking Responsibility Statement, there is still no mention of a student-athlete's ability to sue for defamation. One can conclude, based on the compliance contract, a student-athlete does not forfeit their right to sue for defamation.

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[454] Memorandum from Louisiana State University Compliance on Student-Athlete Packet (Academic Year 2012-2013) (on file with author). Note, these are merely examples of social network activity that may lead to disciplinary action.

[455] *Id*.

[456] *Id*.

[457] *Id*.

[458] *Id*.

[459] *Id*. U-Dilligence is a social network monitoring service. YOUDilligence, http://udiligence.com (last visited Feb 24, 2017).

B. Defamation and the Student-Athlete Plaintiff: Public Official, Private Person, Public Figure, and Matters of Public Concern

Assuming the student-athlete can bring a defamation claim against a media entity, the next question is to determine what plaintiff status the court would give the student-athlete. The court must declare the plaintiff a public official, public figure, or a private person.[460] Whether the matter is one of public concern is also relevant in determining the degree of constitutional protection for the alleged defamatory speech.[461] With limited case law on the topic of defamation pertaining to NCAA student-athletes, it is necessary to analogize with other relevant litigation. For instance, there is ample litigation present concerning defamation of coaches, high school athletes, and professional athletes.[462] Exploring such areas of litigation will allow one to

[460] In a defamation case, a court will consider the plaintiff either a public official, a public figure or a private person. *New York Times v. Sullivan* declared public officials must prove actual malice in order to meet their burden of proof in defamation cases. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-36 (Keith Voelker, 4th ed. 2010) (citing *N.Y. Times Co.*, 376 U.S. at 285–286). Actual malice was established in *New York Times v. Sullivan*. *Id.* at 1-13. The Court defined actual malice as, "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not." *Id.* at 1-25 (quoting *N.Y. Times Co. v. Sullivan* 376). In *Gertz v. Robert Welch, Inc.*, the court defined a public figure as, "those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. *Id.* at 1-33–1-34 (quoting *Gertz*, 418 U.S. at 345). In contrast, a plaintiff considered a private person by the court in a defamation case is to adopt the burden of proof set forth by that particular state "so long as it does not provide for liability without "fault." *Id.* at 6-2 (quoting *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 347 (1974)). Thirty-six states, including Louisiana, the District of Columbia, and Puerto Rico adopted negligence as the burden of proof for a private person claiming defamation. *Id.* at 6-3–6-5.

[461] *Phila. Newspaper*, 475 U.S. at 775.

[462] *See, e.g.*, *Kirk v. Houston's Restaurant, Inc.*, 1988 Tenn. App. LEXIS 292, 13 (1988); *Sarandrea v. Sharon Herald Co.*, 30 Pa. D. 199, 210 (1996)**;** *Maynard v. Daily Gazette Co.*, 191 W.Va. 601, 603 (1994); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 612 (2013); *Faigin v. Kelly*, 184 F.3d 67, 76 (1999).

analogize how such case law is applicable to the questions at hand and what route the court may take in defamation cases of NCAA student-athletes.

1. Public Official

    a. In General

A public official is, "Someone who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers."[463] A student-athlete is not a public official because a student-athlete is

> a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.5.[464]

By comparison, because a student-athlete does not meet the definition of public official in that a student-athlete is a student and not a member of public office, the public official category is eliminated as an option in determining a student-athlete's plaintiff class. Most cases seem to automatically discount the idea of a coach or athlete being considered a public official.[465] *O'Connor v. Burningham*, however, provides an in-depth explanation as to why the court did not

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[463] *Official*, BLACK'S LAW DICTIONARY 1259 (10th ed. 2014).

[464] *See*, NCAA DIVISION I MANUAL, CONST. § 3.2.4.5.

[465] *See, e.g.*, *Cottrell v. NCAA*, 975 So. 2d 306, 333 (Ala. 2007). (this case simply stated, "In this case, the NCAA and Culpepper agree that neither Cottrell nor Williams is a public official." The court also gave no further explanation as to why the plaintiffs were not public officials.); *Carver v. Bonds*, 135 Cal. App. 4th 328, 350-51 (2005) (the argument was made that the publication has protection because it was of a "public official proceeding." The report, nonetheless, was not privileged. Further, the plaintiff was never considered a public official, only a public figure.); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 8 (1990) (On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court.).

declare a coach a public official. As such, it is helpful case law to draw an analogy between why the court did not declare a coach a public official and why a student-athlete would not be a public official.

b. Case Law Analogy

In 2007, the Supreme Court of Utah reversed a motion for summary judgment against a high school basketball coach, Michael O'Connor.[466] The motion for summary judgment was granted in favor of the defendants, declaring O'Connor a public official in the defamation claim he brought against the parents of his former athletes.[467]

The Supreme Court of Utah relied on the rulings of *Rosenblatt v. Baer*[468] and *Curtis v. Butts*[469] to guide their decision declaring O'Connor was not a public official.[470] In his opinion, Justice Nehring recalled the language of *Baer* which said a public official was one "[w]here a position in government has such apparent importance that that public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public

[466] *O'Connor v. Burningham*, 165 P.3d 1214, 1216 (2007).

[467] *Id*. at 1216–1217.

[468] In *Rosenblatt v. Baer*, the Court held in regard to a public official, "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply." *Rosenblatt v. Baer*, 383, U.S. 75, 86 (1966).

[469] In *Curtis v. Butts*, the U.S. Supreme Court declared a significant new rule of law stating a public figure, although not a public official, was still capable of recovering pecuniary damages in a defamation claim so long as they meet the heightened standard of fault by proving actual malice. *Curtis Pub. Co.*, 388 U.S. at 160.

[470] *O'Connor*, 165 P. 3d at 1218.

interest in the qualifications and performance of all government employees."[471] Justice Nehring used the *Curtis v. Butts* ruling to determine what type of person rose to the level of having "apparent importance" stating, "Had the Supreme Court deemed Wally Butts, the defamed plaintiff and University of Georgia athletic director, a public official, we would have been more sympathetic to the Parents' contention that the Lenhi High School women's basketball coach should qualify as well."[472]

Wally Butts was a collegiate coach and athletic director but was not considered a public official because he was employed by a private corporation.[473] The Utah Supreme Court agreed with Chief Justice Warren's concurring opinion when he explained that had the technicality of private employment not intervened, Wally Butts still would not have been considered a public official.[474] The Utah Supreme Court stated that if a university coach did not rise to the level of being a public official neither should the lesser high school coach.[475] The Utah Supreme Court explicitly followed the *Butts* Court when stating that high school coaches are not public officials.[476]

[471] *Id*. at 1216 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1996)).

[472] *O'Connor*, 165 P. 3d at 1218.

[473] *Id*. at 1219.

[474] *Id*.

[475] *Id*.

[476] *Id*.

By analysis, one can conclude student-athletes are not public officials. A coach is superior in rank to the athlete.[477] The coach is the leader of the team in that the coach is the "one who instructs players in the fundamentals of a sport and directs team strategy."[478] The athlete is the player taking direction and instruction from the coach in that the athlete is "a person who is trained or skilled in…sports."[479] O'Connor was not a public official as a high school coach as Wally Butts was not a public official as a collegiate coach.[480] If a coach does not qualify as a public official, neither should a student-athlete.

2. Private Person

a. In General

According to *Black's Law Dictionary*, a private person is, "Someone who does not hold public office or serve in the military; an entity such as a corporation or partnership that is governed by private law."[481] In *Warford v. Lexington Herald-Leader Co.*, the Supreme Court of Kentucky held the plaintiff was considered a private person because, "the plaintiff's failure to thrust himself into a public controversy to influence the outcome of the issues, as well fail[ed] to assume a role of public prominence in the controversy." [482]

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[477] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/coach (last visited Feb. 21, 2017).

[478] *Id.*

[479] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/athlete (last visited Feb. 21, 2017).

[480] *O'Connor*, 165 P.3d at 1219.

[481] *Private Person*, BLACK'S LAW DICTIONARY 1324 (10th ed. 2014).

[482] *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 771 (1990)(citing *Hutchinson v. Proxmire*, 443 U.S. 111 (1979)).

The result of being declared a private person plaintiff is that the plaintiff is not required to prove actual malice in most circumstances.[483] In fact, *Gertz* stated that individual states may choose their standard of law pertaining to private person plaintiffs.[484] The general standard is that a state cannot have a burden of proof less than negligence.[485] Negligence is

> The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights[486]

The prima facie case for negligence is first, the plaintiff must have an injury caused by the defendant. [487] Second, the defendant must have had a duty to protect the plaintiff from the alleged injury and failed to do so.[488] Proving negligence results in compensatory damages[489] for

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[483] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-2 (Keith Voelker, 4th ed. 2010).

[484] *Id*.

[485] *Id*. The following states apply the negligence standard to private person plaintiffs: Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin as well as the District of Columbia and Puerto Rico. *Id*. at 6-3–6-5.

[486] *Negligence*, BLACK'S LAW DICTIONARY 1196 (10th ed. 2014).

[487] *Id*.

[488] *Id*.

[489] According to *Black's Law Dictionary*, compensatory damages are "damages sufficient in amount to indemnify the injured person for the loss suffered." *Damages*, BLACK'S LAW DICTIONARY 472 (10th ed. 2014).

the plaintiff.[490] The plaintiff need only prove negligence by a "preponderance of the evidence," a lower standard to that of "clear and convincing" as seen with actual malice.[491] However, some states apply the actual malice standard by choice.[492]

Additionally, the particular issue or controversy at hand may be one of public concern.[493] If so, that fact carries significant repercussions in determining who has the burden of proof in proving truth or falsity in a defamation suit brought by a private plaintiff.[494] In *Philadelphia Newspapers, Inc. v. Hepps*, the U.S. Supreme Court held the private plaintiff must prove falsity, abandoning the "common law presumption that defamatory speech is false," when:

(1) The defamatory speech at issue is of "public concern,"
(2) The defendant is a member of the media, and
(3) The action is for damages.[495]

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[490] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-2 (Keith Voelker, 4th ed. 2010).

[491] *Id*. at 6-10. According to *Black's Law Dictionary*, preponderance of the evidence is, "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Preponderance of the Evidence*, BLACK'S LAW DICTIONARY 1373 (10th ed. 2014). Clear and convincing evidence is, "Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY 674 (10th ed. 2014).

[492] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-10 (Keith Voelker, 4th ed. 2010). The states that apply actual malice or a similar standard are Colorado, Indiana, New Jersey, Alaska, and Kansas. *Id*. at 6-10–6-15.

[493] *Id*. at 3-10.

[494] *Id*. at 3-10–3-11.

[495] *Id*. at 3-10.

The Court made this holding as a way to protect the First Amendment and the ability of communicators to inform the public on issues they have a right in knowing.[496] Issues of public interest include " complaints by a private citizen to a superior about the conduct of a public employee, statements to government officials in connection with the qualifications of bidders for public works contracts, reports of criminal activity to a proper authority, and testimony before investigating commissions."[497] The plaintiff must prove the allegedly defamatory statement was false by a preponderance of the evidence.[498] Making an analogy to available case law helps in understanding how the private person status might apply to student-athletes.

b. Case Law Analogy

Ackerman v. Paulauskas is an example of a case in which a college basketball coach was declared a private person plaintiff to a defamation suit and, as such, was not required to meet the actual malice standard.[499] Hired in 1999, Paul Ackerman was the men's basketball coach at Assumption College.[500] Ackerman's contract was renewed annually.[501] In December of 2004, however, Assumption College's athletic director, Theodore Paulauskas, informed Ackerman his contract would not be renewed in the upcoming year.[502] Additionally, Paulauskas asked

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[496] *Id*.

[497] *Id*. at 9-34.

[498] *Id*. at 3-16.

[499] *Ackerman v. Paulauskas*, 25 Mass. L. Rep. 527, 7 (2009).

[500] *Id*. at 1.

[501] *Id*.

[502] *Id*. at 7.

Ackerman to resign in February of 2005, prior to the duration of his contract, so Paulauskas could begin the search for a new coach.[503]

Following his February resignation, the *Worcester Telegram & Gazette* published an interview in which Paulauskas said, "The program wasn't on the right path and the prospects didn't look good…[w]e're not looking for a quick fix. We're looking to build a basketball program, one that will contend every year for a conference title."[504] In the article Paulauskas also said, "I am looking for someone who is going to get to the office before me and leave after me."[505]

On August 17, 2005, Ackerman sued Paulauskas and Assumption College for defamation.[506] The Superior Court of Massachusetts applied Massachusetts' two-pronged test to determine if Ackerman was a public figure. Under this test, Ackerman would be declared a limited-purpose public figure if "he either (1) voluntarily inject[ed] himself into a particular public controversy, or (2) engage[d] the public's attention in an attempt to influence the outcome of a public controversy."[507] The Superior Court of Massachusetts held that the comments at issue were not a result of Ackerman thrusting himself into a controversy or "engaging the public in an attempt to influence the outcome of a controversy."[508] Further, while the *Telegram* may have reported on Ackerman a great deal whilst he was the basketball coach, he was still not a

[503] *Id*. at 1.

[504] *Id*. at 7 n. 2.

[505] *Id*. at 2.

[506] *Id*. at 3.

[507] *Id*. at 6.

[508] *Id*. at 7.

public figure.[509] Consequently, the Superior Court of Massachusetts declared Ackerman a private person and did not require him to meet the actual malice standard.[510] It is worth nothing the Superior Court of Massachusetts did not say why Ackerman was not a public figure, only that he was not.[511]

If Ackerman as a collegiate coach is considered a private person,[512] a student-athlete in a similar situation may be considered a private person plaintiff as well. The student-athlete reports to the coach who is the leader in that the coach instructs the players and directs the team.[513] The athlete is the player taking direction, instruction, and training from the coach.[514] If the coach, under these circumstances, is declared a private plaintiff, then a student-athlete may also be declared a private person plaintiff in the same situation. The decision is ultimately left to the discretion of the court. [515] Supporting this finding is the case of *Cottrell v. NCAA.*

Cottrell v. NCAA is a case about two college football coaches. It is a helpful case in distinguishing plaintiff classification because the two coaches were considered two plaintiffs in a singular case who were given separate plaintiff statuses—one plaintiff was considered a public

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[509] *Id*.

[510] *Id*.

[511] *Id*.

[512] *Id*.

[513] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/coach (last visited Feb. 21, 2017).

[514] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/athlete (last visited Feb. 21, 2017).

[515] Stephen G. Strauss, *Defamation and the Collegiate Athlete: The Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 53–54 (1996).

figure while the other was considered a private plaintiff.[516] This is particularly helpful because the Supreme Court of Alabama was clear in distinguishing between a public figure and private person. As such, this case may assist in analogizing how a student-athlete might be categorized as a private person in a defamation claim.

In 2002, two former football coaches from the University of Alabama, Ronald Cottrell and Ivy Williams, sued the NCAA and sportswriter, Tom Culpepper, for defamation.[517] Ronald Cottrell was the recruiting coordinator for the University of Alabama football team.[518] Williams was an assistant coach.[519]

The NCAA investigated the University of Alabama for allegations of recruitment violations surrounding a high school recruit, Albert Means.[520] It was believed Means' high school coach, Logan Young, solicited money from collegiate athletic programs–namely, the University of Alabama– in exchange for the opportunity to recruit Means to play college football.[521] The NCAA investigation was supposed to be confidential. [522] Nonetheless, to help the media stay abreast with the progress of the investigation, the media received access to information.[523]

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[516] *Cottrell v. NCAA*, 975 So. 2d 306 (Ala. 2007).

[517] *Id*. at 325.

[518] *Id*. at 328.

[519] *Id*. at 314.

[520] *Id*. at 318.

[521] *Id*. at 319.

[522] *Id*. at 320.

[523] *Id*.

Over the course of the investigation, Culpepper, a sportswriter, "made references to the coaches at The University as being "cheaters—recruiting cheaters" and references to Williams as being a person who "funneled money" from Young to Means."[524] Additionally, Culpepper "made statements" about Cottrell saying "Cottrell had abandoned his family in Tallahassee; that Cottrell and his assistant had stolen videotapes from The University's athletic department; and that Cottrell had stolen funds from the Shaun Alexander Foundation."[525] The University of Alabama fired both Cottrell and Williams in 2000, but the NCAA investigation reports showed no evidence their firing was a result of NCAA compliance violations.[526]

The NCAA issued a letter of official inquiry (LOI) only to Cottrell and Williams.[527]

> "Williams's LOI charged that he had committed rule violations when he allegedly knew that Means's high school coach had requested money and a vehicle from Young to encourage Means to sign a scholarship to play football for The University and did not report the recruiting misconduct to The University, the SEC, or the NCAA."[528]

The LOI also accused Williams of exceeding the permitted amount of visits to a high school and providing misleading information about Means.[529] Williams admitted to violating the rule

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[524] *Id*. at 319.

[525] *Id*.

[526] *Id*. at 320.

[527] *Id*. at 322.

[528] *Id*.

[529] *Id*.

regulating the number of visits to a high school.[530] However, Williams was not personally charged because this was an infraction by the university.[531]

Cottrell's LOI stated Cottrell violated NCAA regulations in that he received two unauthorized loans from Young, he "knowingly provided misleading information regarding the loans," and he did not report academic fraud regarding a recruit's ACT score.[532] Cottrells' LOI also charged him with allowing a recruit to make phone calls from his office, negotiating with police to have a speeding ticket voided for a student-athlete, and allowed a staff member to drive a student-athlete to his personal home without authorization.[533] Cottrell admitted to all charges against him.[534] Like Williams, Cottrell was not personally charged as these were all violations considered against the university.[535]

The NCAA issued an infraction report on the University of Alabama in 2002 which "focused on the conduct of a "rogue" football athletic representative and some of "the largest money amounts" alleged in any NCAA rule-violation case involving the recruitment of a prospective student-athlete."[536] The report also stated "an eight-year show-cause restriction was imposed against the "recruiting coordinator" and employees."[537] When Cottrell and Williams

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[530] *Id*.

[531] *Id*.

[532] *Id*.

[533] *Id*. at 323.

[534] *Id*.

[535] *Id*.

[536] *Id*. at 322

[537] *Id*. at 324.

sued the NCAA and Culpepper in 2002 they alleged that the NCAA and Culpepper conspired together to cause the false statements that destroyed their reputations and ended their careers as college football coaches.[538]

In determining their plaintiff status, the Supreme Court of Alabama considered this matter one of public concern.[539] This is significant because as a matter of public concern, the speech was afforded greater First Amendment protection, making it harder for the plaintiffs to recover.[540] The Supreme Court of Alabama considered the degree to which the coaches were involved in the matter of public concern, the degree to which they were pulled in to the controversy, whether they thrust themselves into the public sphere concerning this issue, and their position within the football program.[541]

Williams was declared a private plaintiff because, as an assistant coach, he "was neither in such a position of public prominence that he was in a position to influence others, or the outcome of the controversy, nor did he enjoy regular and continuing access to the media."[542] Cottrell, however, was declared a limited-purpose public figure.[543] Cottrell's job as recruiting

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[538] *Id*. at 326.

[539] *Id*. at 327.

[540] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 3-10 (Keith Voelker, 4th ed. 2010). The Court introduced this level of protection in *Philadelphia v. Hepps* to inform the public on issues they have a right in knowing. *Id*.

[541] *Cottrell*, 975 So. 2d at 327.

[542] *Id*.

[543] *Id*. at 328.

coordinator was much more high profile than Williams' position as assistant coach.[544] As recruiting coordinator, Cottrell had access to the media, giving him the opportunity to defend the defamatory statements.[545] This access also allowed him the opportunity to "influence the outcome of the controversy that a private person would not have."[546]

Because *Cottrell v. NCAA* contained two plaintiffs in which one was considered a public figure while the other was considered a private plaintiff,[547] it is a strong example of how fact specific the court considers cases when determining the status of a defamation plaintiff. The court also would likely take a fact specific approach to determine whether a student-athlete was a public figure or a private person.

In *Cottrell v. NCAA* there are two coaches, in the same claim, yet they were declared different types of plaintiffs.[548] The same could be true for student-athletes. If the student-athlete is more characteristic of a Cottrell-type plaintiff–the student-athlete has a high profile position, have ample access to the media to defend themselves and the ability to influence the outcome of the controversy–the student-athlete will likely be considered a public figure. [549] However, if the student-athlete does not have the same characteristics of Cottrell, but, instead, is more characteristic of a Williams-type plaintiff–the student-athlete is not in a "position of public prominence," the athlete's position cannot "influence others, or the outcome of the controversy,"

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[544] *Id*.

[545] *Id*.

[546] *Id*.

[547] *Id.* at 306.

[548] *Id*.

[549] *Id*. at 328.

and the athlete's did "enjoy regular and continuing access to the media"–the athlete will likely be a private person plaintiff. [550]

Based on the case law analogy, it is fair to conclude there are instances in which a student-athlete may be declared a private plaintiff, just as collegiate coaches have been declared as such.[551] The determination will likely be fact dependent and determined on a case by case basis.[552] That being said, most case law points to college coaches and professional athletes being declared public figures logically linking student-athletes to being declared a public figure as well.[553]

3. Public Figure

As previously explained, *Gertz v. Robert Welch, Inc*., was a seminal case in explaining who is considered a public figure and how a public figure differs from a private plaintiff.[554] Specifically, the Court said a public figure is one who "assume[d] special prominence in the affairs of society and to have assume[d] special prominence in the resolution of public questions."[555] These public figures were said, by the Court, to have "voluntarily exposed

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[550] *Id*. at 327.

[551] *See*, *Ackerman*, 25 Mass. L. Rep. at 527; *Cottrell*, 975 So. 2d at 306; *Curtis Pub. Co.*, 388 U.S. at 130.

[552] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-21 (Keith Voelker, 4th ed. 2010).

[553] *See*, *e.g.*, *Cohane v. NCAA*, 2013 U.S. Dist. LEXIS186713, 195 (2013); *Kirk*, 1988 Tenn. App. at 13; *Sarandrea*, 30 Pa. D. at 210. *Maynard*, 191 W. Va. At 603; *Pippen*, 734 F. 3d at 612; *Faigin*, 184 F. 3d at 76; *McGarry*, 154 Cal. App. 4th at 115.

[554] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 15-20–5-21 (Keith Voelker, 4th ed. 2010).

[555] *Id*. at 15-20–5-21, 5-21 n. 151– 152 (internal quotation marks omitted).

themselves to increased risk of injury from defamatory falsehood."[556] Additionally, public figures have greater access to media outlets, affording them a greater opportunity to defend themselves to the public against defamatory speech.[557] The degree of access to the media a plaintiff has is a reoccurring theme in determining their plaintiff status—the more access a plaintiff has to the media to defend themselves from the defamatory statement, the more likely the plaintiff will be considered a public figure.[558]

A person need not meet all the descriptions of a public figure to be considered such.[559] In fact, the Court recognized that a person likely will not meet all these public figure descriptions because situations differ factually on a case by case basis.[560] For this reason, all the descriptions given by the court do not make an explicit definition of a public figure, they are merely guidelines the lower courts apply.[561] Consequently, the lower courts created subcategories of public figures consisting of "all-purpose" public figures and "limited-purpose" public figures.[562]

a. All-Purpose Public Figures

All-purpose public figures are also referred to as "pervasive public figures" because they are people who "occupy positions of such pervasive power and influence that they are deemed

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[556] *Id*. at 5-21 n. 154 (quoting *Gertz*, 418 U.S. at 344–345).

[557] *Id*. at 5-21 n. 153 (quoting *Gertz*, 418 U.S. at 344).

[558] *See, e.g.*, *Cohane*, 2013 U.S. Dist. at 195.

[559] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-21, n. 156 (Keith Voelker, 4th ed. 2010) (citing *Gertz*, 418 U.S. at 345).

[560] *Id*. at 5-21.

[561] *Id*.

[562] *Id*. at 5-21 n. 151–152.

public figures for all purposes."[563] These are people who voluntarily relinquish a degree of protection by stepping in to a publicly visible position.[564] In the 1982 case *Harris v. Tomzcazk*, Judge Lawrence K. Karlton of the U.S. District Court of the Eastern District of California defined an all-purpose public figure as

> A person whose name is immediately recognized by a large percentage of the relevant population, whose activities are followed by that group with interest, and whose opinions or conduct by virtue of these facts, can reasonably be expected to be known and considered by that group in the course of their own individual decision-making.[565]
> However, all-purpose public figures are not limited to those with influential power.[566]

While *Gertz* defined a public figure as a person who "occup[ies] positions of such pervasive power and influence," it also defined a public person as one who gains the public's attention as a result of "general fame or notoriety in the community."[567]

People often considered all-purpose public figures are popular actors and actresses, "successful athletes," and other "household names."[568] They are declared such because they have voluntarily subjected their work to the public eye and gained success, money, and fame.[569] Historically, case law suggests a plaintiff being declared an all-purpose public figure tends to

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[563] *Id*. at 5-22 n. 161 (quoting *Gertz*, 418 U.S. 345, 345 (1974).

[564] *Id*. at 5-22.

[565] *Id*. at 5-22 n. 163.

[566] *Id*. at 5-56.

[567] *Id*. at 5-56–5-57 n. 389–392 (quoting *Gertz*, 418 U.S. 345, 345–352 (1974) (internal quotation marks omitted).

[568] *Id*. at 5-56–5-57 n. 389–392. *Id*. at 5-22 n. 162. *See, e.g.*, *Wohlabaugh v. Salem Communs. Corp.*, 2005-Ohio-1189, 4 (2005).

[569] *Id*. at 5-57.

turn on this fact—whether the plaintiff voluntarily subjected his work to the public eye so as to gain success.[570] As a result he has relinquished a great deal of the reputational protection he would otherwise be granted as a private person.[571]

b. Limited-Purpose Public Figures

Limited-purpose public figures are also referred to as "vortex public figures."[572] *Gertz* described these individuals as ones who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[573] A "public controversy" is not any topic that interests the public.[574] A matter of public controversy is limited to what the court discretionally views as acceptable public discussion.[575] For example, a divorce proceeding is not an issue of public controversy or discussion just because it piques the public's interest.[576] In the 1980 case of *Waldbaum v. Fairchild Publ'ns, Inc.*, the Court of Appeals for the District of Columbia defined public controversy as "a dispute that in fact has received public

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[570] *See, e.g., Chuy v.Phila. Eagles Football Club*, 1978 U.S. App. LEXIS 12132, 50-51 (1978)(stating, "Some individuals of "pervasive fame or notoriety" are public figures in all contexts. Alternatively, "an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Professional athletes, at least as regards their playing careers, assume a position of public prominence.")

[571] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-57 (Keith Voelker, 4th ed. 2010).

[572] *Id*. at 5-23.

[573] *Id*. at 5-23 n. 170 (quoting *Gertz*, 418 U.S. at 345).

[574] *Id*. at 5-58.

[575] *Id*.

[576] *Id*.

attention because its ramifications will be felt by persons who are not direct participants."[577] Limiting matters of public controversies as such eliminates mere curiosity and gossip from protected speech.[578]

In the event a person subjects himself to the public eye surrounding an event that is not a "controversy" (e.g. a major sporting event or entertainment event), that person is said to have sufficiently thrust himself into the vortex for purposes of being classified as a limited-purpose public figure so long as the act was voluntary and public.[579] "Hav[ing] thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"[580] is the biggest factor in declaring plaintiffs limited-purpose public figures.[581]

When limited-purpose public figures' reputations are harmed due to a statement made surrounding their involvement in that particular public controversy, the limited-purpose public figures forfeit a degree of reputational protection because they "propel[ed] themselves into the

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[577] *Id*. at 5-59. According to sack on defamation, "An investigation into alleged industry corruption or drug dealing would, for example, meet this [the District of Columbia's] test." *Id*. *See*, *Waldbaum v. Fairchild Publ'ns, Inc.* 627 F.2d 1287 (1980).

[578] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-58–5-59 (Keith Voelker, 4th ed. 2010).

[579] *Id*. at 5-60. A common concern is the concept of "bootstrapping." This means a journalist has given a person or controversy so much press that it forces the person of interest into being a limited-purpose public figure. This is not an acceptable act to essentially create a public figure, especially if the topic is a private concern. This concept implies the possibility of an involuntary public figure. Because there is no such recognized category, it would be very rare to find an involuntary public figure *Id*. at 5-62.

[580] *Id*. at 5-23 n. 170 (quoting *Gertz*, 418 U.S.at 345).

[581] *See, e.g*., *Sarandrea*, 30 Pa. D. at 210 (which said "a limited public figure is an individual who is drawn up into a particular public controversy and, thus, becomes a public figure for a limited range of issues relating to that controversy… the public controversy requirement can only be met by a controversy which attracts the public's interest because it affects persons other than the direct participants;" *McGarry*, 154 Cal. App. 4th at 115; *Faigin*, 184 F. 3d at 76.

vortex of public disputes."[582] Several lower courts developed tests to determine who falls into the limited-purpose public figure category.[583] For example, the Second Circuit said the plaintiff must have

> (1) Successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.[584]

To consider a plaintiff a limited-purpose public figure in the Sixth Circuit, "(1) a public controversy must exist; and (2) the nature and extent of the individual's participation in the particular controversy must be ascertained."[585] Within the second prong, the Sixth Circuit Court also considers, how voluntary the participation in the controversy was, how much access the plaintiff had to communications to rebut the statement, and how significant a role the plaintiff played in the public controversy.[586] Similarly, in the Court of Appeals for the District of Columbia, asks the following questions in determining if a plaintiff is a limited-purpose public figure:

> (1) Is there a public controversy?
> (2) Has the plaintiff played a sufficiently central role in the controversy?
> (3) Is the alleged defamatory statement germane to the plaintiff's participation in the controversy?[587]

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[582] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-23 (Keith Voelker, 4th ed. 2010) (internal quotation marks omitted).

[583] *Id*.

[584] *Id*. at 5-24–5-25 n.175.

[585] *Id*. at 5-25.

[586] *Id*.

[587] *Id*. at 5-23–5-24 n. 173.

The greatest consequence of being declared a public figure plaintiff is that the plaintiff is faced with the task of proving actual malice on behalf of the defendant.[588] This means the plaintiff must show the defendant made the alleged defamatory statement "with knowledge that it was false or with reckless disregard for whether it was false or not."[589] Relying on the ruling in *Garrison v. Louisiana*, the plaintiff must prove the statement was made "with a high degree of awareness of [its] probable falsity."[590]

This burden of proof is on the plaintiff and they prove it by presenting evidence of the alleged act.[591] The plaintiff must answer the following elements of actual malice:

1. What made you believe the accusation?
2. Did anything cause you to doubt it?[592]

Actual malice must be present at the time of publication.[593] Essentially, the defendant must have published a false statement and knew it was false at the time of publication.[594] If a defendant published a false statement but did not know it was false at publication, he is not liable for

[588] *Id*. at 5-74.

[589] *Id*. at 5-74 n. 456 (quoting *N.Y. Times Co.*, 376 U.S. at 279–80).

[590] *Id*. at 5-75 n. 462. Note, this is a departure from the professional standard that asks how a reasonable person in the same profession would act under similar circumstances. *Id*. at 5-75.

[591] *Id*. at 5-75.

[592] BARBARA DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 34 (The Free Press 1986).

[593] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-78 (Keith Voelker, 4th ed. 2010).

[594] *Id*. at 5-78–5-79.

publication with actual malice.[595] The defendant reporter can overcome actual malice by providing her own evidence with the sources she believed were credible.[596]

c. Case Law Analogy

The only found litigation of a NCAA student-athlete bringing a defamation action and best case law example pertaining to the questions at hand is the case of *Holt v. Cox Enterprise*.[597]

On November 18, 1961, the University of Alabama ("Alabama") and Georgia Tech competed in a "highly publicized football game."[598] In the fourth quarter, Alabama's Darwin Holt hit Georgia Tech's Chick Graning.[599] Graning suffered from injuries consisting of "a broken jaw, a broken nose, a concussion, and the loss of several teeth."[600] Officials did not call any sort of penalty against Holt, igniting a national conversation about the hit.[601] While Holt, himself, did not comment on the issue at the time, many journalists published articles on the incident.[602]

Years later, in 1979, the narrative resurfaced.[603] At this time, Holt participated in an interview with *The Tuscaloosa News* resulting in a series of five articles published in the *Sunday*

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[595] *Id*. at 5-79.

[596] BARBARA DILL, THE JOURNALIST'S HANDBOOK ON LIBEL AND PRIVACY 34 (The Free Press 1986).

[597] *Holt*, 590 F. Supp. at 412.

[598] *Id*. at 409.

[599] *Id*. at 410.

[600] *Id*.

[601] *Id*.

[602] *Id*. Holt did not publically comment on the hit at the time but did so prior to bringing suit in 1984 claiming the hit was, in fact, legal.

[603] *Id*.

Atlanta Journal and Constitution.[604] The articles revisited the famous hit and cited many comments made about Holt following the game.[605] The articles included phrases describing the hit such as, "old Alabama greeting "pow" right in the kisser, a "cheap shot" a "flying elbow," Holt's "latest act of violence," an "illegal" blow, and the striking of Graning "so savage[e] and unexplainabl[e]."[606]

In 1984, over 20 years after the Holt-Graining hit, Holt sued Cox Enterprises, Inc. for libel[607] and invasion of privacy.[608] The U.S. District Court for the Northern District of Georgia found the published statements about Holt referred to his experience as a college athlete and injured his reputation to the degree of rising to defamation.[609] The U.S. District Court did, however, declare Holt a limited-purpose public figure because

> As a member of the Alabama football team, Holt voluntarily played that sport [football] before thousands of persons – spectators and sportswriters alike – and he necessarily assumed the risk that these persons would comment on the manner in which he performed. The defamatory comments in the articles relate solely to Holt's play on the field and are thus within the limited range of issues upon which

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[604] *Id*. The articles were written by Darrell Simmons, defendant to the action. The fact that Holt commented on the incident is a significant element in determining if Holt is a public figure or private person under defamation law. Following *Gertz v. Robert Welch, Inc.*, whether the plaintiff "thrust himself or his views into public controversy to influence others" was a significant element in determining if the plaintiff was a public figure or private person for purposes of a defamation claim." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-35 (Keith Voelker, 4th ed. 2010) (quoting *Gertz*, 418 U.S. at 345).

[605] *Holt*, 590 F. Supp. at 410.

[606] *Id*. at 411.

[607] Libel is "written or visual defamation." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 2-10 (Keith Voelker, 4th ed. 2010).

[608] *Holt*, 590 F. Supp. at 408.

[609] *Id*. at 411.

> Holt invited comment. Holt, like other sports figures who have sought redress through defamation actions…must be considered a public figure, whose actions on the field sportswriters may criticize within the protective "breathing space" required by the First Amendment.[610]

Finding he was a limited-purpose public figure escalated the plaintiff's burden of proving fault to that of proving "actual malice."[611] Actual malice was established in *New York Times v. Sullivan.*[612] The Court defined actual malice as, "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not."[613] This standard provided more protection to the media against being held liable for harming the reputation of public figures on a matter of public concern.[614] Unable to prove actual malice, Holt failed in his effort to recover damages.[615]

This case is distinguishable from the query of determining whether a student-athlete would be considered a public figure or private person in that Holt was a *former* NCAA student-athlete, depleting his NCAA eligibility more than a decade prior to the law suit.[616] The U.S.

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[610] *Id*. at 412.

[611] *Id*. at 412–13. *See also* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-13 (Keith Voelker, 4th ed. 2010).

[612] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-13 (Keith Voelker, 4th ed. 2010).

[613] *Id*. at 1-25 (quoting *N.Y. Times Co.*, 376 U.S. at 254).

[614] *Id*. at 1-30–1-31 (quoting *N.Y. Times Co.*, 376 U.S. at 254). The justices understood the difficulty in a journalist's job of trying to report to the public while still trying to quote speakers verbatim. *Id*. "So long as the gist of a quotation is correct, errors that do not materially change the meaning of the statement do no constitute "actual malice" even when they are made deliberately." *Id*.

[615] *Holt*, 590 F. Supp. at 413.

[616] *Id*. at 410.

District Court addressed Holt's status as a former student-athlete.[617] Holt claimed his role as an Alabama football player should not sway the court to declare him a public figure because his involvement with the football team greatly pre-dated the trial, making it no longer relevant.[618] However, the court said whether Holt brought the claim in 1964 or 1979 was immaterial to his status as a limited-purpose public figure because he was declared so for several reasons.[619]

To start, Holt continued to have access to the press for several years following his collegiate athletic career up to a month before the five articles at issue were published.[620] Holt's conduct on the field was also an issue of public interest.[621] Additionally, the public had a significant interest in the hit and how it affected the Georgia Tech-Alabama game.[622]

Holt also argued he should not be considered a public figure because he was not a professional athlete.[623] The court declared

> By voluntarily engaging in a highly publicized sporting event, Holt necessarily attracted publicity. He had been the subject of press recognition even before the incident occurred. That Holt was not paid for his performance does not alter the fact that once he played in a public contest he was bound, if successful to encounter substantial recognition of a comment upon both his good and bad play.[624]

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[617] *Id*. at 412.

[618] *Id*. at 413.

[619] *Id*. at 412

[620] *Id*.

[621] *Id*. Matters of public interest are awarded greater first amendment protection. SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 3-10 (Keith Voelker, 4th ed. 2010).

[622] *Holt*, 590 F. Supp. at 412.

[623] *Id*.

[624] *Id*.

Holt's final argument was that as an Alabama football player, his intentions were to only enter a "small part of the public scene."[625] Quoting the ruling of *Rosanova v. Playboy Enterprises, Inc.*,[626] the court declared, "It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be."[627] In other words, Holt's feelings of not wanting to be a public figure had no bearing on the fact that he *was* a public figure.[628]

One can draw the clearest conclusion—although still not a bright line rule—by comparing the *Holt v. Cox Enterprises* case to a current student-athlete. Holt's time as a student-athlete did not make him an all-purpose public figure because he "ha[d] not achieved such pervasive fame or notoriety that he [had become] a public figure for all purposes and in all contexts."[629] His notoriety was limited to the arena and public eye surrounding his sport.[630] Similarly, if a student-athlete was only recognized within her specific playing field and only in the public light pertaining to that arena, she would likely not be declared an all-purpose public

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[625] *Id*.

[626] *Rosanova*, 580 F.2d at 859. In *Rosanova v. Playboy, Enterprises, Inc.*, Mr. Rosanova appealed his public figure status on the grounds that he "never sought such a status." The court said Mr. Rosanova's desire to be a public figure had no bearing on the factual basis that he was a public figure. The court explained, "The purpose served by limited protection to the publisher of comment upon a public figure would often be frustrated if the subject of the publication could choose whether or not he would be a public figure." *Id*. at 861.

[627] *Holt*, 590 F. Supp. at 412 (quoting *Rosanova* 580 F.2d at 861).

[628] *Id*. at 412.

[629] *Id*. at 411–412 (internal quotation marks omitted).

[630] *Id*. at 412.

figure, as Holt was not. On the other hand, just as Holt was declared a limited-purpose public figure, the student-athlete might be considered a limited-purpose public figure for her notoriety within her arena.

Holt was a former student-athlete. The U.S. District Court, however, felt this distinction was minor due to the fact that there were so many other factors supporting Holt's classification as a limited-purpose public figure.[631] For example, because Holt was voluntarily in a highly publicized sport, he had access to the press, and his actions were ones of public interest, he was a limited-purpose public figure.[633] Therefore, if student-athletes similarly participate in highly-publicized sports and have access to media, they would likely be considered a limited-purpose public figure.

d. Synthesizing Public Figures

Holt is not the only student-athlete in the collegiate or high school athletic arena whom courts have deemed a public figure.[634] Courts also have found coaches, professional athletes, and high school athletes to be public figures.[635] In fact, many courts "have concluded professional and collegiate athletes and coaches are *at least* limited-purpose public figures."[636] The United

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[631] *Id*.

[633] *Id*.

[634] *See, e.g.*, *Cohane*, 2013 U.S. Dist. at 195.

[635] See, e.g., *Kirk*, 1988 Tenn. App. at 13; *Sarandrea*, 30 Pa. D. at 210**(**which stated, "In determining whether plaintiff is a public figure, this court is guided by a long line of cases holding that athletes and coaches are either "all-purpose" public figures or so-called "limited-purpose" public figures." The *Sarandrea* court also stated, "High school coaches are not immune to the glare of adverse publicity. . . . such coaches, and their policies "are of as much concern to the community as other 'public officials' and 'public figures.'"); *Maynard*, 191 W.Va. at 603; *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 612 (2013); *Faigin*, 184 F. 3d at 76.

[636] *McGarry*, 154 Cal. App. 4th at 115 (emphasis added).

States District Court for the Northern District of California said a "common thread in these cases is that one's voluntary decision to pursue a career in sports, whether as an athlete or a coach, "invites attention and comment" regarding his job performance and thus constitutes an assumption of the risk of negative publicity."[637]

The *Gertz* Court declared public figures: "assumed prominence in society,[638] voluntarily exposed themselves to falsehood, and[639] had greater access to the media to defend themselves against defamatory speech." [640] These factors did not create an explicit definition of a public figure; they were merely guidelines for the lower courts to apply.[641] The *Holt* court applied similar standards, declaring Holt a limited-purpose public figure because he "[1] voluntarily played that sport [football] before thousands of persons – spectators and sportswriters alike…[2] necessarily assumed the risk that these persons would comment on the manner in which he performed…[3] [and the alleged defamatory statement] relate[d] solely to Holt's play on the field."[642] Other courts applied their own unique factors. Common amongst all the courts, however, is that a public figure is someone who: voluntarily thrust himself into the public

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[637] *McGarry*, 154 Cal. App. 4th at 115 (quoting *Barry v. Time, Inc.* 584 F. Supp. 1110, 1119(1984)).

[638] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-21, n. 151– 152 (Keith Voelker, 4th ed. 2010) (internal quotation marks omitted).

[639] *Id.* at 5-21 n. 154 (quoting *Gertz*, 418 U.S. at 344–345).

[640] *Id.* at 5-21 n. 153 (quoting *Gertz*, 418 U.S. at 344).

[641] *Id.* at 5-21.

[642] *Holt*, 590 F. Supp. at 412.

controversy,[643] invited public attention, thus necessarily assuming the risk of defamation,[644] and had greater access to the media.[645]

A court ultimately has the discretion to declare a student-athlete a public figure or private person. [646] Combing the factors of previous case law, however, one can conclude that if a student-athlete voluntarily thrust himself into the public controversy,[647] invited public attention assuming the risk of defamation,[648] and had greater access to media to defend their reputation,[649] a court will likely declare the student-athlete a limited-purpose public figure.

C. NCAA Student-Athletes and Non-Media Defendants

1. Suing a Non-Media Defendant

Regardless of the party being a media or non-media defendant, the plaintiff's *ability* to bring a cause of action turns on the fact that "virtually any person or nongovernmental entity that

[643] *See, e.g.*, *Holt*, 590 F. Supp. at 412; *Ackerman*, 25 Mass. L. Rep. at 1; *Cottrell*, 975 So. 2d at 327; *Sarandrea*, 30 Pa. D. at 210; SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25 n.175 (Keith Voelker, 4th ed. 2010); *Id.* at 5-2; *Id.* at 5-23–5-24 n.173.

[644] *See, e.g.*, *Cottrell*, 975 So. 2d at 328; *Sarandrea*, 30 Pa. D. at 210; *Maynard*, 191 W. Va. At 603; *McGarry*, 154 Cal. App. 4th at 115.

[645] *See, e.g.*, *Maynard*, 191 W. Va. At 602; SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25, n.175 (Keith Voelker, 4th ed. 2010).

[646] Stephen G. Strauss, *Defamation and the Collegiate Athlete: The Case of Failed Reporting and an NFL Drug Test*, 33 SPORTS LAW. J. 51, 53–54 (1996).

[647] *See, e.g.*, *Holt*, 590 F. Supp. at 412; SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–25 n.175 (Keith Voelker, 4th ed. 2010); *Id.* at 5-25; *Id.* at 5-23–5-24 n.173.

[648] *See, e.g.*, *Cottrell*, 975 So. 2d at 328; *Sarandrea*, 30 Pa. D. at 210; Maynard, 191 W. Va. At 603; *McGarry*, 154 Cal. App. 4th at 115.

[649] *See, e.g.*, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25 n.175 (Keith Voelker, 4th ed. 2010).

makes a defamatory false statement and is capable of being sued may be liable therefor."[650] The U.S. Constitution, Article IV, section 2, paragraph 1[651] affords all citizens the basic right to bring suit in a court of law.[652] In fact, *Chambers v. Baltimore & O.R. Co*. explained this right is a cornerstone of "orderly government" and must be allowed "by each State to the citizens of all other States."[653] However, just because a plaintiff can sue does not mean he will automatically be successful in his efforts. The plaintiff must, first, meet the prima facie case for defamation.

First, the plaintiff must show the alleged defamatory statement was published in a manner accessible to a third party.[654] To publish means "to distribute copies (of a work) to the public. To communicate (defamatory words) to someone other than the person defamed."[655] The alleged defamatory statement must also "cause damage to someone's good name or reputation"[656]

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[650] *Id.* at 2-173.

[651] The U.S. Constitution, Article IV, section 2, paragraph 1 states "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." U.S. CONST. art. IV, §2, cl. 1.

[652] *Chambers*, 28 S.Ct. at 34.

[653] *Id.*

[654] Stephen G. Strauss, *Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 52 (1996) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th Ed. 1984)).

[655] *Publish*, BLACK'S LAW DICTIONARY 1428 (10th ed. 2014).

[656] Stephen G. Strauss, *Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 52 (1996) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th Ed. 1984)).

The plaintiff must also prove the alleged defamatory statement false whether the plaintiff is a public official, public figure, private person, or it is an issue of public concern.[657] In *Phialdelphia Newspaper v. Hepps*, the U.S. Supreme Court declared that matters of public concern demand greater constitutional protection to inform and protect the public.[658] *New York Times v. Sullivan* only required a public figure prove falsity to recover in a defamation suit on matters of public concern.[659] However, *Phildelphia Newspaper v. Hepps* expanded upon this, requiring a private person plaintiff also show the alleged defamatory statement as false when it is a matter of public concern.[660] The Court implemented this standard of law to prevent a chilling effect.[661] Falsity is a required element because "to do otherwise could only result in a deterrence of speech which the Constitution makes free."[662]

Finally, the plaintiff must prove the defendant's negligence or actual malice in making the statement.[663] In a defamation case, the court will consider the plaintiff either a public figure or a private person.[664] A public figure is one who "occup[ies] [a] position of such persuasive

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[657] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 2-7 (Keith Voelker, 4th ed. 2010). Note, falsity was historically presumed, but since *New York Times v. Sullivan*, it now must be proved by the plaintiff. *Id.*

[658] *Phila. Newspaper*, 475 U.S. at 775.

[659] *Id.*

[660] *Id.*

[661] *Id.* at 777 (internal quotation marks omitted).

[662] *Id.* at 777.

[663] The standard is determined by whether the plaintiff is considered a public figure or private person.

[664] *See*, ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-10 and 1-17 (Keith Voelker, 4th ed. 2010) (quoting *Gertz*, 418 U.S. at 345).

power and influence" that the figure is a public figure for all purposes.[665] Public figures must prove actual malice on behalf of the defendant in a defamation suit.[666] Actual malice is "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not."[667] In contrast, a private person plaintiff to a defamation suit has the burden of proof set forth by that particular state.[668] Most states adopted negligence as the burden of proving fault for a private person claiming defamation.[669] If an NCAA student-athlete meets the above elements, it is likely she has a viable claim to bring against the defendant.[670]

2. Non-Media Defendant, Public or Private Plaintiff?

Despite the difference of the defendant being a non-media entity, the student-athlete's classification as a public figure or private person plaintiff is still likely fact dependent and determined on a case by case basis.[671]

Recall in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, the U.S. Supreme Court declared the standard for a non-media defendant in a defamation case.[672] In 1985, Greenmoss Builders sued Dun & Bradstreet, Inc. for defamation when Dun & Bradstreet, Inc. released an

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[665] *Id.* at 1-33–1-34 (quoting *Gertz*, 418 U.S. at 345).

[666] *Id.* at 1-12 (quoting *Gertz*, 418 U.S. at 345).

[667] *Id.* at 1-25 (quoting *N.Y. Times Co.*, 376 U.S. at 254).

[668] *Id.* at 6-2 (quoting *Gertz*, 418 U.S. at 347).

[669] *Id.* at 6-3–6-5.

[670] A viable claim does not mean they will win. It simply means the claim is not frivolous.

[671] *Id.* at 5-21.

[672] *Dun & Bradstreet*, 472 U.S. at 751.

incorrect bankruptcy report to five of their subscribers.[673] The Court was and remains reluctant in relying on the *Gertz* actual malice standard because it was a split decision.[674] The Court observed that some states do not allow plaintiffs to sue private defendants and only apply the *Gertz* actual malice standard to "institutional media."[675]

In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, however, the U.S. Supreme Court was more concerned with protecting actual speech than the status of the defendant becuase the publication at issue was one of public concern.[676] The Court felt Dun & Bradstreet's report was an issue of public concern in that it "implicated strong state interest in protecting consumers and regulating commercial transactions."[677] Consequently, Greenmoss Builders were held to proving

[673] *Dun & Bradstreet*, 472 U.S. at 751–752.

[674] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-3 (Keith Voelker, 4th ed. 2010). The *Gertz* Court found Gertz was neither a public official or public figure. *Gertz*, 418 U.S. at 332. To classify Gertz, the Court explicitly defined a public figure as, "those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-33–1-34 (Keith Voelker, 4th ed. 2010)(quoting *Gertz*, 418 U.S. at 345). In doing so, the Court created a "limited-purpose" public figure. *Id.* at 1-323. This is someone who, "By propelling themselves into the "vortex" of public disputes, they, too, surrender some protection for their reputation, but only insofar as the communication relates to their involvement in the dispute." *Id.* A split decision of the court means the court was split in their vote and the decision was not unanimous. This is significant because the *Dun & Bradstreet, Inc. v. Greenmoss Builders* holding does not carry the weight of a unanimous decision.

[675] *Id.* at 6-25. These states are Hawaii, Oklahoma, and Texas. 2010. *Id.*

[676] *Dun & Bradstreet*, 472 U.S. at 795–796.

[677] *Id.* at 796 (internal quotation marks omitted).

the actual malice standard despite Dun & Bradstreet, Inc., being a non-media defendant because anything "less than a showing of actual malice simply exacts too high a toll on First Amendment values."[678]

Dun & Bradstreet, Inc. v. Greenmoss Builders is distinguishable from the issue at hand because both parties in *Dun & Bradstreet, Inc. v. Greenmoss Builders* were neither members of the media nor NCAA student-athletes. While there are no found defamation cases on student-athletes suing non-media defendants, there are cases of coaches and professional athletes suing non-media defendants.

a. Public Figure Plaintiff

McNair v. NCAA is a case from the Court of Appeal of California in which Todd McNair, assistant coach at the University of Southern California (USC), sued the NCAA for defamation.[679] The court considered McNair a limited-purpose public figure.[680]

In September 2009, the NCAA launched an investigation into USC following allegations that a student-athlete, Reggie Bush, received illegal financial benefits from prospective agents, Lloyd Lake and Michael Michaels.[681] When the NCAA issued their investigative report, the NCAA explicitly drew attention to assistant football coach, Todd McNair.[682] The report stated

[678] *Id.* at 796.

[679] *McNair v. NCAA*, B245475, 2015 Cal. App. Unpub. LEXIS 8809, 1 (2015).

[680] *Id.* at 35.

[681] *Id.* at 4.

[682] *Id.* at 5.

Mcnair had an early morning phone call with Lake resulting in his knowledge of the unethical transactions between Bush and the agents.[683]

The NCAA charged McNair with unethical conduct and violation of NCAA rules. [684] McNair was "prohibited from engaging in recruiting activities or interacting with prospective student-athletes" and was placed under strict surveillance by any employer.[685] As a result, McNair sued the NCAA for defamation.[686]

The Court of Appeal of California declared McNair a limited-purpose public figure when stating "[A] common thread in these cases is that one's voluntary decision to pursue a career in sports, whether as an athlete or a coach, "invites attention and comment" regarding his job performance and thus constitutes an assumption of the risk of negative publicity."[687] The court declared McNair a limited-purpose pubic figure because he was a former professional athlete and he was the assistant football coach for University of Southern California. Consequently, "he accepted the position knowing that the football program at USC was highly publicized, and assumed the risk of publicity, both good and bad, as it related to his public performance."[688] Because the alleged defamatory statement focused on his role as an assistant coach, the court declared him a limited-purpose public figure, requiring him to meet the actual malice standard.[689]

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[683] *Id.* at 6.

[684] *Id.* at 5.

[685] *Id.*

[686] *Id.* at 1.

[687] *Id.* at 34– 35(quoting Barry, 584 F. Supp. at 1118–1119).

[688] *Id.* at 35(citing *Time,* 448 F. 2d at 380).

[689] *Id.* at 35.

Similarly, a student-athlete also may be considered a limited-purpose public figure if the athlete accepts a position on a high-profile football team just as McNair did in a way that was so "highly publicized, and [he] assumed the risk of publicity, both good and bad, as it related to his public performance."[690] The language that McNair knew the program was "highly publicized"[691] and, as such, "assumed the risk of publicity" [692] implies that a program that is not highly publicized does not make a participant "assume the risk of publicity." [693] Therefore, if the athlete is associated with an environment that does not necessarily cause the student-athlete to "assume the risk of publicity, both good and bad, as it related to his public performance," [694] the court may not deem the student-athlete a public figure. Ultimately, the decision is left to the discretion of a court. [695]

b. Private Person Plaintiff

The case of *Moss v. Stockard* illustrates the instance in which a collegiate coach was considered a private person when she sued the University of the District of Columbia's (UDC) athletic director, a non-media defendant, for defamation.[696]

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[690] *Id.*

[691] *Id.*

[692] *Id.*

[693] *Id.*

[694] *Id.*

[695] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-21 (Keith Voelker, 4th ed. 2010).

[696] *Moss v. Stockard*, 580 App. D.C. 1011, 1014 (1990).

On June 1, 1979, the UDC's athletic director, Orby Z. Moss, hired Bessie Stockard as the head coach for the women's basketball team.[697] Because Stockard was already a Physical Education Professor at UDC, she was hired as a part-time coach and compensated $9,000 for the year.[698] Her contract was re-evaluated and renewed on an annual basis.[699]

On March 25, 1981, Stockard learned her contract would not be renewed for the upcoming year because of "Moss's dissatisfactions with her handling of and accounting for university funds disbursed to cover meal and other expenses during a three-day trip to Atlanta for two away games."[700] When two players, Theresa Snead and Alice Butler, inquired as to why Stockard was fired, Moss told them it was due to "misappropriation of funds."[701] Snead testified Moss's statement "was just like he was saying she [Stockard] had been stealing."[702]

When Stockard sued Moss for defamation the judge declared her a private person plaintiff.[703] The District of Columbia Court of Appeals analyzed why Stockard was a private person and not a public official or public figure.[704] Relying on *New York Times Co. v. Sullivan* and *Rosenblatt v. Baer*, the District of Columbia Court of Appeals said

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[697] *Id.*

[698] *Id.*

[699] *Id.*

[700] *Id.*

[701] *Id.* at 1016.

[702] *Id.*

[703] *Id.* at 1029.

[704] *Id.*

> Their [public officials'] need to prove greater fault by a greater degree of factual certainty than private plaintiffs stems from (1) the public's strong interest in robust and unfettered debate concerning issues related to governmental affairs, and (2) the fact that public officials, with superior access to the media, usually are better able than ordinary individuals to affect the outcome of those issues to counteract effects of negative publicity.[705]

The court does not have a specific definition as to who is included as a public official.[706] While Stockard is officially a government employee as she works for a government owned institution, it is not clear how far down the hierarchy someone is to be considered a "public official."[707] Furthermore, courts have reached different conclusions as to whether "teachers in publicly sponsored educational organizations are "public officials" for purposes of defamation law."[708]

The District of Columbia Court of Appeals described public officials as those who "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[709] The court believed there are some instances in which a collegiate coach might attract public interest, but this was not a case in which the public would believe Stockard was a person who had "substantial responsibility for or control over governmental affairs."[710] Consequently, she was considered a private person plaintiff and not a public official.[711]

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[705] *Id.*

[706] *Id.*

[707] *Id.*

[708] *Id.*

[709] *Id.* at (quoting Rosenblatt, 83 S.Ct. at 85–86).

[710] *Id.* at 1029.

[711] *Id.* at 1030.

The court also analyzed why Stockard was not a limited-purpose public figure under the *Waldbaum* test.[712] The court considered:

1. Whether the controversy to which the defamation relates was the subject to public discussion prior to the statement.[713]
2. Whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.[714]
3. The plaintiff's role in the controversy and whether they "purposefully tr[ied] to influence the outcome or could realistically have been expected because of his position in the controversy, to have an impact on its resolution."[715]

The court said while journalists and the basketball community may have been interested in Stockard's termination, the topic was hardly something that would "have substantial ramifications for non-participants."[716] Additionally, Stockard did not try to give "her side of the story," nor did she attempt to use her position to influence the outcome.[717] Most significant, the District of Columbia Court of Appeals said, "Stockard's position is markedly different from that of other sports figures who have become so prominent 'they unavoidably enter the limelight,' becoming general purpose public figures."[718] Therefore, Stockard was considered a private person plaintiff and did not have to prove actual malice against Moss, the non-media defendant.[719]

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[712] *Id.* (citing *Waldbaum*, 201 U.S. App. D.C. at 301).

[713] *Id.* at 1030.

[714] *Id.*

[715] *Id.* at 1031.

[716] *Id.*

[717] *Id.* at 1032.

[718] *Id.* at 1033.

[719] *Id.*

Applying the rational from Stockard to assess whether a NCAA student-athlete is a public official, a student-athlete is also not a public official. A student-athlete is "a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program."[720] Consequently, student-athletes do not meet the District of Columbia Court of Appeals' definition of public officials, who "have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[722]

In regard to declaring a student-athlete a private person plaintiff, a student-athlete may be considered such if a student-athlete has the same characteristics as Stockard. For example, a member of a less popular sport may attract attention within her particular arena, but she may not rise to the level of other sports figures who have become so prominent "'they unavoidably enter the limelight,' becoming general purpose public figures."[723] Also significant is that the court declared Stockard a private person because she did not try to give "her side of the story," nor did she attempt to use her position to influence the outcome.[724] In other words, she did not thrust herself into the vortex of the controversy. The *Gertz* Court explicitly defined public figures as persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" and, "more commonly," those who "have thrust themselves to the

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[720] *See*, NCAA DIVISION I MANUAL, CONST. § 3.2.4.5. The manual also states, "Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.5. A student is not deemed a student-athlete solely on the basis of prior high school athletics participation."

[722] *Moss*, 580 App. D.C. at 1029.

[723] *Id.* at 1033.

[724] *Id.* at 1032.

forefront of particular public controversies in order to influence the resolution of the issues involved."[725] In doing so, the Court created the "limited purpose" public figure categorization.[726] This is for persons who, "By propelling themselves into the 'vortex' of public disputes, they, too, surrender some protection for their reputation, but only insofar as the communication relates to their involvement in the dispute."[727] Since Stockard did not give "her side of the story" and did not attempt to use her position to influence the outcome, she was not a limited purpose public figure.[728] In parallel, if a student-athlete was not a high profile figure and did not voluntarily thrust herself into the vortex of the controversy, a court may declare her a private person, as the District of Columbia Court of Appeals declared Stockard a private person. Such decisions ultimately are left to the discretion of each court. [729]

3. Media v. Non-Media Defendant and Their Degree of First Amendment Protection

The U.S. Supreme Court never explicitly distinguished between the protection of the media and non-media defamation defendants.[730] They have, however, ruled in a manner that blurs the treatment of media and non-media defendants, making it unclear as to whether they are

[725] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-33–1-34 (Keith Voelker, 4th ed. 2010)(quoting *Gertz*, 418 U.S. at 345).

[726] *Id.* at 1-323.

[727] *Id.*

[728] *Moss*, 580 App. D.C. at 1032.

[729] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-21 (Keith Voelker, 4th ed. 2010).

[730] SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSORS 40 (Daxton R. "Chip" Stewart, 2013).

to be afforded the same degree of First Amendment protection.[731] For example, in *Gertz*, Justice Powell expressed the need to protect "publishers," "broadcasters," and "the media."[732] Because he did not explicitly state the need to protect non-media defendants, many interpreted his opinion to mean defendants who are *not* "publishers," "broadcasters," or "the media" are not granted the same protection as media defendants.[733] In Justice O'Connor's *Hepps* opinion, she explicitly denoted in a footnote, "Nor need we consider what standards would apply if the plaintiff sues a non-media defendant" providing further proof the treatment of media and non-media defendants is, at least, murky.[734] Because the Court explicitly stated when the media requires greater First Amendment protection, but has not done so for non-media defendants, "lower courts have definitively held [this] to mean non-media defendants are not entitled to the same level of protection as media defendants" in defamation law suits.[735] This means, historically, journalists have greater First Amendment protection than individuals who are not members of the media.[736] However, this too is changing as technology changes.

Determining who is considered a "member of the media" is also unclear. *Snyder v. Phelps* declared, "Any effort to justify a media/nonmedia distinction rests on unstable ground,

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[731] *Id.*

[732] *Id.*

[733] *Id.*

[734] *Phila. Newspaper*, 475 U.S. at 795 n.4.

[735] SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSORS 41 (Daxton R. "Chip" Stewart, 2013).

[736] *Id.*

given the difficulty of defining with precision who belongs to the media."[737] *Snyder v. Phelps* also showed a shift to focusing on the speech, itself, as opposed to the source when the ruling stated, "And, more importantly, the Supreme Court has concluded that the "inherent worth of speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual. Thus, for our purposes, the status of the Defendants as media or nonmedia is immaterial."[738] While history has afforded greater protection to media, more change on the frontier of First Amendment law is expected as technology continues to advance. [739]

D. Internet Defamation

1. Arising Issues

Communications and publications via social media websites are increasingly becoming the norm.[740] With so many non-media social networking users publishing their own comments online, many legal questions about how the current law applies to the social media arena have arisen.[741]

Social media is used by members of the media as well as people who are not associated with the media.[742] They use social networks like Facebook, Twitter, Instagram, Snapchat, and

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[737] *Snyder*, 580 F.3d at 219 n.13 (internal quotation marks omitted).

[738] *Id.* (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777(1978)).

[739] Christopher Escobedo Hart, *Social Media Law: Significant Developments*, 72 BUS. LAW. 235, 238 (2016-2017).

[740] SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSORS 39 (Daxton R. "Chip" Stewart, 2013).

[741] *Id.*

[742] Christopher Escobedo Hart, *Social Media Law: Significant Developments*, 72 BUS. LAW. 235, 235 (2016-2017).

LinkedIn to "keep in touch with friends and family, make professional connections, and communicate their personal, political, religious, or other views."[743] Such outlets are a platform for potential defamation claims, making users increasingly vulnerable.[744]

There is not a specific area of the law that addresses "social media law."[745] Consequently, many are left to question how the current law is applicable to the Internet world.[746] However, in defamation suits, courts have continuously treated the online arena with the same manner they would treat a traditional publication, applying the same defamation law.[747] In "Social Media Law: Significant Developments," Christopher Escobedo Hart explained, "Courts have not created brand new rules and paradigms to grapple with social media ubiquity and complexity, but rather have consistently applied existing legal standards to the social media space," which "suggests that, at least in the legal world, there is little difference between online and offline conduct."[748]

In *State of North Carolina v. Bishop*, the Supreme Court of North Carolina addressed the First Amendment in regard to online Facebook posts in a cyberbullying case.[749] During the 2011-2012 academic school year, classmates of Dillon Price took to Facebook to post messages

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[743] *Id.*

[744] Alyssa J. Long, *Internet Defamation*, 273 Tex. B.J. 202, 202 (2010).

[745] Christopher Escobedo Hart, *Social Media Law: Significant Developments*, 72 BUS. LAW. 235, 235 (2016-2017).

[746] *Id.*

[747] *Id.*

[748] *Id.*

[749] *Id.* at 239.

concerning Price that "included comments and accusations about each other's sexual proclivities, along with name-calling and insults."[750] Price's mother feared for his well-being and reported the Facebook posts to the police.[751] Defendant Robert Bishop was arrested and convicted of cyberbullying.[752] On appeal, the Supreme Court of North Carolina found the cyberbullying statute unconstitutional in that it regulated protected speech.[753]

While *State of North Carolina v. Bishop* pertains to a cyberbullying statue and not defamation, it is still relevant because "the court reasoned that there is no substantive distinction between posting online and other traditional forms of protected speech."[754] Specifically in regard to online postings, the court wrote, "Such communication does not lose protection merely because it involves the "act" of posting information online, for much speech requires an "act" of some variety—whether putting ink to paper or paint to canvas, or hoisting a picket sign, or donning a message-bearing jacket."[755] As a result, internet defamation should be assessed under traditional defamation law.[756] However, courts foresee a great amount of expansion in First Amendment law due to the ever-advancing developments of technology and social media.[757]

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[750] *State of N.C. v. Robert Bishop*, 368 N.C. 869, 869 (2016).

[751] *Id.* at 870

[752] *Id.* at 871. *See,* N.C.G.S. § 14–458.1.

[753] *State of N.C.*, 368 N.C. at 880.

[754] Christopher Escobedo Hart, *Social Media Law: Significant Developments*, 72 BUS. LAW. 235, 239 (2016-2017).

[755] *State of N.C.*, 368 N.C. at 874.

[756] Christopher Escobedo Hart, *Social Media Law: Significant Developments*, 72 BUS. LAW. 235, 240 (2016-2017).

[757] *Id.* at 238.

On January 17, 2014, the U.S. Court of Appeals for the Ninth Circuit held "First Amendment defamation rules apply equally to both the institutional press and individual speakers and writers, such as bloggers."[758] In *Obsidian Fin. Group, LLC v. Cox,* Obsidian Finance Group, LLC (Obsidian) sued Courtney Cox for defamation after she published several blog posts in which she accused Obsidian of illegal activities connected to one of their clients.[759] The criminal activity included fraud and money-laundering.[760]

In that ruling, the Ninth Circuit revisited *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.*, but acknowledge a problem in that, "This case involves the intersection between *Sullivan* and *Gertz*, an area not yet fully explored by this Circuit, in the context of a medium of publication—the Internet—entirely unknown at the time of those decisions."[761] This court also said that while the U.S. Supreme Court has not explicitly distinguished media and individual speakers, every circuit has.[762] Specifically, the circuit courts provide the same degree of First Amendment protection to media institutions as they do to individual speakers following the *Snyder v. Phelps* ruling, which stated, "Any effort to justify a media/non-media distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the media."[763]

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[758] *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1287 (2014).

[759] *Id.*

[760] *Id.*

[761] *Id.* at 1290

[762] *Id.* at 1291.

[763] *Id.* at 1292 (quoting *Snyder*, 562 U.S. at 219 n.13) (internal quotation marks omitted).

The court declared the content of the blog post an issue of public concern and required the plaintiffs prove Cox acted with actual malice.[764] This decision provided Cox, an individual blogger unassociated with the formal press, the same degree of First Amendment protection as a journalist.[765] The ruling is significant to the media and non-media alike because, as the court stated, "Now, all that is required is writing and reporting that commands an audience."[766]

2. What Internet Defamation Means for Student-Athletes

Thanks to social media, student-athletes and their activity are readily available to the public.[767] Additionally, athletes are easy targets for online conversation.[768] While speech is protected under the First Amendment, there are situations in which an online user may exceed the scope of protection afforded by the First Amendment.[769] In such instances, there is no form of recourse for the student-athlete under current law.[770]

In the event an athlete was defamed on a social networking site, he cannot sue the individual social media sites or the Internet Service Provider (ISP) because they are "immune from liability for their users' behavior by the legislative safeguards granted to ISPs through the

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[764] *Obsidian Fin. Grp., LLC*, 740 F.3d at 1292.

[765] *Id.*

[766] Julie Hilden, *The Ninth Circuit Holds—Correctly—That a Blogger Has the Same Defamation Protection as a Journalist*, VERDICT, Feb. 3, 2014, http://verdict.justia.com/2014/02/03/ninth-circuit-holds-correctly-blogger-defamation-protection-journalist.

[767] Dominick J. Mingione, *Wide Right: How ISP Immunity and Current Laws are Off the Mark in Protecting the Modern Athlete on Social Media*, 5 PACE INTELL. PROP., SPORTS, & ENT. L. F. 32, 35 (2015).

[768] *Id.*

[769] *Id.*

[770] *Id.* at 36.

Communications Decency Act [CDA] and the Digital Millennium Copyright Act [DMCA]."[771] Specifically, Section 230(c)(1) of the CDA states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[772] The CDA exempts ISPs from civil liability when a user posts defamatory language.[773] While actual networks like Twitter and Facebook cannot be sued for defamatory posts made by their users, there is a case in which a NBA basketball referee sued the individual reporter, instead, who tweeted a defamatory tweet.[774]

In *Spooner v. Associated Press*, William H. Spooner, the referee of a National Basketball Association (NBA) game between the Minnesota Timberwolves and the Houston Rockets, sued Jon Krawczynski for tweeting, "Ref Bill Spooner told Rambis he'd 'get it back' after a bad call. Then he made an even worse call on Rockets. That's NBA officiating folks."[775]

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[771] *Id.* at 35.

[772] 47 U.S.C. §230(c)(1). Interactive computer service is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. §230(f)(2). Internet content provider is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. §230(f)(3).

[773] Dominick J. Mingione, *Wide Right: How ISP Immunity and Current Laws are Off the Mark in Protecting the Modern Athlete on Social Media*, 5 PACE INTELL. PROP., SPORTS, & ENT. L. F. 32, 42 (2015).

[774] Complaint at 6, *William H. Spooner v. The Associated Press, Inc. and Jon Krawczynski*, No.11-cv-00642-JRT-JJK (D Minn.R.1.1(a) 2011).

[775] *Id.*

The tweet followed a call by Spooner against a Minnesota Timberwolves player,[776] after which Krawczynski claimed he was within hearing distance and heard Spooner exchange words with Houston coach, Kurt Rambis.[777] Spooner sued the Associated Press for defamation, claiming the tweet harmed his personal and professional reputation, resulting in disciplinary investigation following the publication of the tweet.[778] Before the case could reach trial, the parties settled outside court for $20,000 and the removal of the tweet from Krawencynski's Twitter account.[779] Due to the settlement, it is still unknown as to how this situation would have played out in a court of law. What is clear, however, is this is an increasingly gray area of law that brings with it many questions as to how athletes will be treated in such defamation cases and what degree of First Amendment protection will be afforded to members of the media and individual speakers of online social media content.

[776] *Id.* at 5.

[777] *Id.*

[778] *Id.* at 6–7.

[779] "AP and NBA ref reach settlement in tweet," THE ASSOCIATED PRESS, Jan. 10, 2012, http://www.ap.org/Content/AP-In-The-News/2011/AP-and-NBA-ref-reach-settlement-in-tweet-suit.

CHAPTER 7: CONCLUSION

This thesis set out to discover a number of issues. The first being whether a NCAA student-athlete can sue a media entity, journalist, or non-media defendant for defamation. After extensive research, this thesis found that a student-athlete *can* sue a media or non-media entity for defamation. Article IV, section 2, paragraph 1 of the U.S. Constitution affords all citizens the basic right to bring suit in a court of law.[780] It states, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[781]

Additionally, a NCAA student-athlete does not contract out of a right to sue for defamation. A student-athlete need only enter into an at-will agreement with the university by "meet[ing] minimal academic entrance standards, become[ing] a student at the university, and qualif[ing] as an amateur."[782] Upon entering into this agreement, a student-athlete agrees to comply with the regulations of the university in line with the NCAA compliance regulations.[783] There is nothing in NCAA Compliance paperwork that prohibits a student-athlete from bringing a defamation claim.[784]

[780] *Chambers*, 28 S.Ct. 34 (1907).

[781] U.S. CONST. art. IV, §2, cl. 1.

[782] Alfred Dennis Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 St. Louis U.L.J. 39, 51 (1990).

[783] *Id.*

[784] Memorandum from Louisiana State University Compliance on Student-Athlete Packet, 7 (Academic Year 2012-2013) (on file with author).

A student-athlete, like any plaintiff, must meet the prima facie elements of the defamation claim.[785] If a student-athlete meets those elements, it is likely the athlete has a viable claim to bring against the defendant.[790]

With proof that a student-athlete *can* bring a defamation claim, the next issue was to determine whether a college athlete bringing a defamation claim would be declared a public official, private person, or public figure plaintiff. However, with no case law found pertaining to the defamation of a current student-athlete, this thesis used court rulings addressing coaches, a former college athlete, high school athletes, and professional athletes to analogize how a college student-athlete's case may play out in court.

A student-athlete will not be considered a public official because by definition, the two are not the same. A public official is, "Someone who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers."[791] A student-athlete is not a public official because a student-athlete is a student whose participation represents the intercollegiate athletic program.[792] Because a student-athlete does not meet the

[785] First, the athlete must "prove the alleged defamatory statement was published in a manner accessible to a third party." Second, Prove the alleged defamatory statement "cause[s] damage to someone's good name or reputation." Stephen G. Strauss, *Defamation and the Collegiate Athlete: the Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 52 (1996) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th Ed. 1984)). Third, Prove the alleged defamatory statement is false if it involves a matter of public concern. ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* 2-7 (Keith Voelker, 4th ed. 2010). Finally, Prove the defendant's negligence or actual malice in making the statement. (Note, the standard is determined by whether the plaintiff is considered a public figure or private person).

[790] A viable claim does not mean they will win. It simply means the claim is not frivolous.

[791] *Official*, BLACK'S LAW DICTIONARY 1259 (10th ed. 2014).

[792] *See,* NCAA DIVISION I MANUAL, CONST. § 3.2.4.5.

definition of public official, the public official category is eliminated as an option in determining the student-athlete's plaintiff class.

Furthermore, cases seem to automatically discount the idea of a coach or athlete being considered a public official.[794] Courts routinely declared coaches are not public officials.[796] In *O'Connor v. Burningham*, Justice Nehring recalled the language of *Rosenblatt v. Baer* which said a public official was one "[w]here a position in government has such apparent importance that that public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees."[797] The coach is the leader of the team in that the coach is the "one who instructs players in the fundamentals of a sport and directs team strategy."[798] An athlete is a player taking direction and instruction from the coach in that an athlete is "a person who is

[794] *See, e.g.*, *Cottrell*, 975 So. 2d at 333 (this case simply stated, "In this case, the NCAA and Culpepper agree that neither Cottrell nor Williams is a public official or a general-purpose public figure." They gave no further explanation as to why the plaintiffs were not public officials, but they did, however, elaborate on why the plaintiffs were not all-purpose figures.); *Carver*, 135 Cal. App. 4th at 350–351 (the argument was made that the publication has protection because it was of a "public official proceeding." The report, nonetheless, was not privileged. Further, the plaintiff was never considered a public official, only a public figure.); *Milkovich*, 497 U.S. at 8. (On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court.).

[796] *See, e.g.*, *Curtis Pub. Co.*, 388 U.S. at 140–142; *O'Connor*, 165 P. 3d at 1219; *Rosenblatt*, 383 U.S. at 86.

[797] *O'Connor*, 165 P.3d at 1216 (quoting *Rosenblatt*, 383 U.S. at 86).

[798] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/coach (last visited Feb. 21, 2017).

trained or skilled in . . . sports."[799] If the coach does not qualify as a public official, by analysis, neither will an athlete.

There is case law supporting the fact that a student-athlete *may* be declared a private person.[800] A private person is, by definition, "Someone who does not hold public office or serve in the military; an entity such as a corporation or partnership that is governed by private law."[801] In *Ackerman v. Paulauskas* a college basketball coach was declared a private person plaintiff to a defamation suit and, as such, was not required to meet the actual malice standard.[802] The Superior Court of Massachusetts held that the comments at issue were not a result of Ackerman thrusting himself into a controversy or "engaging the public in an attempt to influence the outcome of a controversy."[803] Further, while the *Telegram* may have reported on Ackerman a great deal whilst he was the basketball coach, he was still not a public figure.[804] Consequently, the Superior Court of Massachusetts declared Ackerman a private person and did not require him to meet the actual malice standard.[805]

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[799] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/athlete (last visited Feb. 21, 2017).

[800] *See, e.g.*, *Ackerman*, 25 Mass. L. Rep. 527; *Cottrell*, 975 So. 2d at 327.

[801] *Private Person*, BLACK'S LAW DICTIONARY 1324 (10th ed. 2014). The result of being declared a private person plaintiff is that the plaintiff is not required to prove actual malice in most circumstances. SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 6-2 (Keith Voelker, 4th ed. 2010).

[802] *Ackerman*, 25 Mass. L. Rep. at 7.

[803] *Id.*

[804] *Id.*

[805] *Id.*

Similarly, in *Cottrell v. NCAA*, Ivy Williams was declared a private plaintiff because, as an assistant football coach at the University of Alabama, he "was neither in such a position of public prominence that he was in a position to influence others, or the outcome of the controversy, nor did he enjoy regular and continuing access to the media."[806] If a student-athlete has similar characteristic as Ivy Williams in that he is not in a "position of public prominence" and his position cannot "influence others, or the outcome of the controversy," even if he did "enjoy regular and continuing access to the media," he may be a private person plaintiff. [807]

Relevant private person plaintiff case law centers around college coaches bringing defamation suits.[808] A coach instructs players and directs the team.[809] An athlete takes direction, instruction, and training from the coach.[810] If the coach, under these circumstances, is declared a private plaintiff, then a student-athlete may also be declared a private plaintiff in the same situation.

The court ultimately has the discretion whether to declare a student-athlete a private person plaintiff. [811] Case law trends show coaches and professional athletes involved with high-publicity sports are generally declared limited-purpose public figures, logically linking a student-athlete in a sport that receives high publicity to being declared a limited-purpose public figure as

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[806] *Cottrell*, 975 So. 2d at 327.

[807] *Id.*

[808] *See, e.g.*, *Cottrell*, 975 So. 2d at 327; *Ackerman*, 25 Mass. L. Rep. at 527.

[809] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/coach (last visited Feb. 21, 2017).

[810] MIRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/athlete (last visited Feb. 21, 2017).

[811] Stephen G. Strauss, *Defamation and the Collegiate Athlete: The Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 53–54 (1996).

well.[812] However, other case law trends also show that coaches and professional athletes are "simply" public figures and not put into an all-purpose or limited-purpose public figure category.[813] What is clear is that, "athletes and coaches are either 'all-purpose' public figures or so-called 'limited-purpose'" public figures."[814]

Recall *Gertz v. Robert Welch, Inc*. was the seminal case in explaining who is considered a public figure and how they differ from a private plaintiff.[815] The Court said a public figure is one who: "assume[d] special prominence in the affairs of society and to have assume[d] special prominence in the resolution of public questions,"[817] "voluntarily exposed themselves to increased risk of injury from defamatory falsehood,"[818] and has greater access to media outlets, affording them a greater opportunity to defend themselves to the public against defamatory speech.[819] A person, however, will likely not meet all these public figure descriptions because

[812] *See, e.g.*, *Kirk*, 1988 Tenn. App. at 13; *Sarandrea*, 30 Pa.D. at 212; *Maynard*, 191 W. Va. at 603; *Faigin*, 184 F.3d 76; *McGarry*, 154 Cal. App. 4th at 115.

[813] *See, e.g.*, *Cohane*, 2013 U.S. Dist. at 191; *Pippen*, 734 F.3d at 612.

[814] *Sarandrea*, 30 Pa.D. at 212. *See, e.g.*, *Curtis Publishing Co.*, 87 S.Ct. at 210*; Barry*, 587 F. Supp. at 1110; *Barsarich v. Rodegheron*, 312 N.E.2d at 739.

[815] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 15-20–15-21 (Keith Voelker, 4th ed. 2010).

[817] *Id.* at 5-21 n. 151–152 (internal quotation marks omitted).

[818] *Id.* at 5-21 n. 154 (quoting *Gertz*, 418 U.S. at 344–345).

[819] *Id.* at 5-21 n. 153 (quoting *Gertz*, 418 U.S. at 344).

situations differ factually on a case by case basis.[820] For this reason, lower courts have treated these factors merely as guidelines.[821]

Many courts "have concluded professional and collegiate athletes and coaches are *at least* limited purpose public figures."[822] While courts apply their own unique factors, the common trends amongst the courts' rulings are that they find a public figure to be someone who voluntarily thrusts himself into the public controversy,[823] invited public attention, thus necessarily assuming the risk of defamation,[824] and had greater access to the media.[825] Using that case law as a guide, one can conclude that if a student-athlete voluntarily thrusts himself into a public controversy,[826] invited the public attention assuming the risk of defamation, and had greater access to the media to defend their reputation,[827] a court will likely declare him a public figure.

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[820] *Id.* at 5-21.

[821] *Id.*

[822] *McGarry*, 154 Cal. App. 4th at 115 (emphasis added).

[823] *See, e.g.*, *Holt*, 590 F. Supp. at 412; *Ackerman*, 25 Mass. L. Rep. at 1; *Cottrell*, 975 So. 2d at 327; *Sarandrea*, 30 Pa.D. at 210; SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25 n.175 (Keith Voelker, 4th ed. 2010); *Id.* at 5-25; *Id.* at 5-23–5-24 n.173.

[824] *See, e.g.*, *Cottrell*, 975 So. 2d at 328; *Sarandrea*, 30 Pa.D. at 210; *Maynard*, 191 W.Va. at 603; *McGarry*, 154 Cal. App. 4th at 115.

[825] *See, e.g.*, *Maynard*, 191 W.Va. at 602; SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25 n.175 (Keith Voelker, 4th ed. 2010).

[826] *See, e.g.*, *Holt*, 590 F. Supp. at 412; SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25 n.175 (Keith Voelker, 4th ed. 2010); *Id.* at 5-25; *Id.* at 5-23–5-24 n.173.

[827] *See, e.g.*, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25 n.175 (Keith Voelker, 4th ed. 2010).

As a public figure, the student-athlete would be required to prove actual malice. Recall, the Court defined actual malice as "publication with knowledge that the offending statement is false or with reckless disregard of whether it is false or not."[828] As such, more protection would be provided to the media against being held liable for harming the reputation of the student-athlete on a matter of public concern.[829]

Knowing a student-athlete's plaintiff status and burden of proving fault is important because we live in a time when college athletes are trained to talk to the media after a game.[830] Understanding plaintiff classification of a student-athlete helps universities and athletes know at what point the student-athletes seal their fate in becoming limited-purpose public figures related to athletics. While there are several factors contributing to athletes being declared public figures, one way to attempt to protect themselves from crossing the threshold into the public figure realm is by not "thrusting themselves into the vortex" of the controversy.[831] In other words, in the event athletes find themselves at the center of defamatory speech, they can help their plaintiff status by refraining from commenting on the controversy and keeping themselves distanced from the

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[828] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-25 (Keith Voelker, 4th ed. 2010) (quoting *N.Y. Times Co.*, 376 U.S. at 254).

[829] *Id.* at 1-30—1-31(quoting *N.Y. Times Co.*, 376 U.S. at 254).The justices understood the difficulty in a journalist's job of trying to report to the public while still trying to quote speakers verbatim. *Id.* "So long as the gist of a quotation is correct, errors that do not materially change the meaning of the statement do no constitute "actual malice" even when they are made deliberately." *Id.*

[830] *See, e.g.*, Ron Higgins, *LSU Tiger's learn how to talk the talk*, THE TIMES PICAYUNNE, Aug. 9, 2014, http://www.nola.com/lsu/index.ssf/2014/08/_rons_fast_break.html.

[831] An individual can become a public figure "by propelling themselves into the "vortex" of public disputes, they, too, surrender some protection for their reputation, but only insofar as the communication relates to their involvement in the dispute." ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-323 (Keith Voelker, 4th ed. 2010).

conversation.[832] This vortex concept is important for college athletes to understand so they can know what they should and should not address when dealing with the media. However, it is important to keep in mind that being involved in the conversation at issue is not the only factor in being declared a public figure. A court will also consider the degree to which the student-athlete invited the public attention, thus necessarily assuming the risk of defamation[833] and how much access the student-athlete had to the media to defend her reputation.[834]

On the flip side, understanding how the student-athlete may be classified in a defamation case is important for journalists because it helps them gauge their degree of First Amendment protection when reporting on a student-athlete. Under First Amendment theory, is it well known that speech which "defames a private person at least negligently and a public official or figure with actual malice" is not protected by the First Amendment.[835] Thomas Scanlan, unraveled the Millian principle advocating for a government that could maintain authority over its citizens while affording them the freedom of expression.[836] Scanlan believed violating the Millian principle[837] took away "the right of citizens to make up their own minds."[838] However, Scanlan,

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[832] *See, e.g. Moss v. Stockard*, 580 App. D.C. at 1032.

[833] *See, e.g., Sanadrea*, 30 Pa. D. at 210; *Maynard*, 191 W.Va. at 603; *McGarry*, 154 Cal. App. 4th at 115.

[834] *See, e.g., Maynard*, 191 W.Va. at 602; SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-24–5-25 n.175 (Keith Voelker, 4th ed. 2010).

[835] RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 18 (2003).

[836] Thomas Scanlan, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 214 (1972).

[837] In 1972, Thomas Scanlon developed the "Millian principle" in which he outlined two types of harms that prove the negative effect of regulating citizens' speech.[837] These two harms are "(a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of

himself could not deny that "acts of expression [that] bring about injury or damage as a direct physical consequence" should not be protected. In fact, he wrote

> It seems clear that when harms brought about in this way are intended by the person performing an act of expression, or when he is reckless or negligent with respect to their occurrence, then no infringement of freedom of expression is involved in considering them as possible grounds for criminal penalty or civil action.[839]

Put simply, taking action against speech that causes harm does not infringe on the freedom of speech. [840] As such, it is essential for journalists to understand when such legal action can be brought against them specifically as it pertains to reporting on student-athletes. Knowing under what circumstances an athlete will most likely be declared a limited-purpose public figure affords the journalists a higher level of protection.[841] Most important, understanding their degree of protection prevents a chilling effect on the journalists and affords them the liberty to report more freely.[842]

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expression, where the connection between the acts of expression and the subsequent harmful acts consist merely in the fact that the act of expression left the agents to believe (or increased their tendency to believe) these acts to be worth performing." Thomas Scanlan, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1972).

[838] *Id.* at 221–222.

[839] *Id.* at 210.

[840] *Id.*

[841] This standard provided more protection to the media against being held liable for harming the reputation of public figures on a matter of public concern. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-30—1-31 (Keith Voelker, 4th ed. 2010) (quoting *N.Y. Times Co.*, 376 U.S. at 254).

[842] *See, e.g.*, *Rosenbloom*, 403 U.S. at 50; David A. Anderson, *The Promises of New York Times v. Sullivan*, 20 ROGERS WILLIAMS U. L. REV. 1, 2 (2015).

Recall, a cornerstone of Free Speech Theory is that the truth will prevail in the marketplace of ideas.[843] Leaving the availability to ascertain the truth to the will of the government or authoritative censorship does not ensure truth will prevail. [844] Thomas Scanlan believed "the authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include authority to prevent these harms by controlling people's sources of information to insure that they will maintain certain beliefs."[845] The marketplace of ideas theory protects all ideas and citizens' ability to freely express those ideas in an effort to prevent authoritative institutions from censoring truth.[846] This allows citizens to have control over their expression.[847] Additionally, under the watchdog theory, it is important for journalists to understand their freedoms and limitations so they can "serve as a neutral forum for debate, a marketplace of ideas."[848]

Finally, with the advancement of the Internet, communication and publications via social media websites are increasingly becoming the norm, leaving many questions surrounding the Internet, social media, and defamation left unanswered.[849] In defamation suits, nonetheless,

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[843] ENCYCLOPEDIA OF THE FIRST AMENDMENT 2, at 708 (John R. Vile et al. eds., 2009).

[844] *Id.*

[845] Thomas Scanlan, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 222 (1972).

[846] *Id.*

[847] Recall C. Edwin Baker's liberty model, people should have complete control over their expression. ERIN K. COYLE, THE PRESS AND RIGHTS TO PRIVACY: FIRST AMENDMENT FREEDOM VS. INVASION OF PRIVACY CLAIMS 24 (2012).

[848] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975) (internal quotation marks omitted).

[849] SOCIAL MEDIA AND THE LAW: A GUIDEBOOK FOR COMMUNICATION STUDENTS AND PROFESSORS 39 (Daxton R. "Chip" Stewart, 2013).

courts have continuously treated the online arena with the same manner they would treat a traditional publication, applying the same defamation law precedents.[850]

Student-athletes' posts on social media pages can easily be intercepted by journalists and lay social network users. [851] This makes athletes vulnerable targets for online conversation.[852] There is no clear answer as to how a defamation case will play out in a court of law surrounding a student-athlete and social media. What is clear, however, is this is an increasingly gray area of law that brings with it many questions as to how athletes will be treated in such defamation cases and what degree of First Amendment protection will be afforded to members of the media and individual speakers of online social media content. More change on the frontier of First Amendment law is expected as technology continues to advance. [853]

Based on *Holt*,[854] and cases involving coaches and professional athletes, student-athletes may be declared a private plaintiff or a public figure depending on the circumstances surrounding the claim.[855] Although cases do not provide a bright-line rule as to whether a

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[850] Christopher Escobedo Hart, *Social Media Law: Significant Developments*, 72 BUS. LAW. 235, 235 (2016-2017).

[851] Dominick J. Mingione, *Wide Right: How ISP Immunity and Current Laws are Off the Mark in Protecting the Modern Athlete on Social Media*, 5 PACE INTELL. PROP., SPORTS, & ENT. L. F. 32, 35 (2015).

[852] *Id.*

[853] Christopher Escobedo Hart, *Social Media Law: Significant Developments*, 72 BUS. LAW. 235, 238 (2016-2017).

[854] *See*, *Holt*, 590 F. Supp. at 408

[855] *See, e.g.*, *Cottrell*, 975 So. 2d at 327; *Ackerman*, 25 Mass. L. Rep. at 527; *Sarandrea*, 30 P. D at 212; *Curtis*, 87 S.Ct. at 210;*Barry*, 587 F. Supp. at 1110; *Basarich*, 321 N.E.2d at 739; Additionally, many courts "have concluded professional and collegiate athletes and coaches are *at least* limited-purpose public figures." *McGarry*, 154 Cal. App. 4th at 115 (emphasis added).

student-athlete is a public figure who must prove actual malice or a private person who must prove negligence, the case law indicates that the *Gertz*[856] factors are consistently applied by some courts as guidelines to determine whether a coach or professional athlete is considered a public figure or private person. This means courts have consistently considered:

1. The plaintiff's access to the media, and
2. The degree to which the person "thrust himself into the vortex of this public issue."[857]

Other courts, however, have relied on the issue being one of public controversy, or what the court discretionally views as acceptable public discussion.[858] *Waldbaum v. Fairchild Publ'ns, Inc.*, defined public controversy as "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants."[859] Specifically, the Court of Appeals for the District of Columbia, ask the following questions in determining if a plaintiff is a limited-purpose public figure:

1. Is there a public controversy?
2. Has the plaintiff played a sufficiently central role in the controversy?
3. Is the alleged defamatory statement germane to the plaintiff's participation in the controversy?[860]

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[856] *See*, *Gertz*, 418 U.S. at 323.

[857] *Gertz*, 418 U.S. at 349.

[858] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-58 (Keith Voelker, 4th ed. 2010).

[859] *Id. at* 5-59. According to sack on defamation, "An investigation into alleged industry corruption or drug dealing would, for example, meet this [the District of Columbia's] test." *Id. See*, *Waldbaum*, 627 F.2d at 1287.

[860] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-23–5-24 n. 173 (Keith Voelker, 4th ed. 2010).

Several circuits have incorporated the *Walbaum* factors into their defamation rulings.[861] To align with current practices of the circuit courts, simultaneously uphold the U.S. Supreme Court ruling in *Gertz*, and satisfy the concerns of First Amendment theory, this author's best recommended practice is to combine both the *Gertz* factors and *Walbaum* factors–or those factors similar to *Walbaum* adopted by other circuit courts–to create a roadmap to classifying a plaintiff as a public figure.[862]

Gertz should not be replaced by *Waldbaum*, outright, because *Gertz* accounts for the plaintiff's degree of access to the media. [863] This is an area *Walbaum* does not include in its three-pronged test.[864] *Gertz* found this significant because the first remedy to a defamatory statement is to "minimize its [the statement's] adverse impact on reputation."[865] Public figures have greater access to media thus affording them greater protection from defamatory statements.[866] In contrast, private persons have less access to communication channels giving them less ability to remedy the situation and, consequently, increasing the risk of injury from the

[861] For example, the Second Circuit said the plaintiff must have (1) Successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media. *Id.* at 5-24–5-25 n.175. The Sixth Circuit "(1) a public controversy must exist; and (2) the nature and extent of the individual's participation in the particular controversy must be ascertained." *Id.* at 5-25

[862] *Supra*, note 853

[863] *Gertz*, 418 U.S. at 349.

[864] *Supra*, note 851.

[865] *Gertz*, 418 U.S. at 344.

[866] *Id.*

defamatory statements.[867] The emphasis placed upon access to the media by the *Gertz* court is a direct parallel to the criticism of the marketplace of ideas theory.

This prong is parallel to the marketplace of ideas theory because the economic marketplace and the marketplace of ideas recognize that the rich and people of greater public stature have an increased level of participation in both the economic marketplace and the marketplace of ideas.[868] *Gertz* used this increased access to distinguish public figures from private persons. Public officials and public figures' increased access to communication outlets affords them the ability to "minimize its adverse impact on reputation," and, in turn, affords them greater protection against defamatory statements. [869]

There is, however, overlap between the *Gertz* and *Walbaum* factors. The degree to which the person "thrust[s] himself into the vortex of this public issue"[870] and whether the plaintiff played a sufficiently central role in the controversy[871] ultimately have the same goal—determine if the plaintiff was involved in the issue upon which the defamatory statement surrounds. In essence, the *Walbaum* factors reiterate the *Gertz* factors, accounting for their vortex concerns.

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[867] *Id.*

[868] RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1, at 2-16.1, 2-16.4 (2008).

[869] *Gertz*, 418 U.S. at 344.

[870] *Id.* at 349.

[871] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-23–5-24 n. 173 (Keith Voelker, 4th ed. 2010).

Walbaum departs from *Gertz* by adding the issue of public controversy. [872] It is only when the plaintiff voluntarily and publicly subjects himself to an event that is *not* a "controversy" that a person sufficiently thrusts himself into the vortex for purposes of being classified as a limited-purpose public figure.[873] While *Walbaum* still accounts for the vortex aspect of *Gertz*, adding the issue of public controversy aligns the *Walbaum* test with First Amendment concerns.

Once again reflecting the marketplace of ideas, *New York Times v. Sullivan* accounted for the necessity of free speech in the marketplace and the ability to allow the truth to prevail. The Court stated, people are not only entitled to "speak one's mind, but also the freedom to be informed about public issues." [874] *New York Times* expanded the marketplace of ideas to protect ideas *and* information. [875] Applying the marketplace of idea premise that truth will prevail through open conversation, Justice Brennan also indicated that citizens should be allowed to discuss public matters even if those conversations led to unpleasant thoughts and reactions.[876] It was this way of thinking that led the Court to afford greater First Amendment protection to

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[872] *Id. Waldbaum v. Fairchild Publ'ns, Inc.*, defined public controversy as "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." *Id.* at 5-59.

[873] *Id*. at 5-60. A common concern is the concept of "bootstrapping." This means a journalist has given a person or controversy so much press that it forces the person of interest into being a limited-purpose public figure. This is not an acceptable act to essentially create a public figure, especially if the topic is a private concern. This concept implies the possibility of an involuntary public figure. Because there is no such recognized category, it would be very rare to find an involuntary public figure. *Id.* at 5-62.

[874] David A. Anderson, *The Promises of New York Times v. Sullivan*, 20 ROGERS WILLIAMS U. L. REV. 1, 21 (2015).

[875] *Id.* at 23.

[876] *N.Y. Times Co*, 376 U.S. at 270.

speech.[877] The Court feared that limiting open debate in an effort to avoid the accusation of defaming another's character would create a chilling effect on public conversation and public issues.[878] This idea of creating an open atmosphere for public conversation is a direct application of the marketplace of ideas.[879]

While combining the *Gertz* and *Walbaum* factors is a recommended roadmap to determining whether a student-athlete plaintiff is a public figure, it is important to keep in mind that the Court recognized a person will likely *not* meet all these public figure descriptions because situations differ factually on a case by case basis.[880] This is why lower courts have treated these factors merely as applicable guidelines.[881] As such, this author recommends applying the *Gertz* and *Walbaum* factors and determining plaintiff classification based on the totality of the circumstances in order to uphold current circuit court practices, the U.S. Supreme Court's intention for *Gertz*, as well as First Amendment theory.

While case law shows the classification of a student-athlete plaintiff in a defamation suit will either be a private person or public figure, the ultimate decision is left to the discretion of the

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[877] ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-6 (Keith Voelker, 4th ed. 2010).

[878] David A. Anderson, *The Promises of New York Times v. Sullivan*, 20 ROGERS WILLIAMS U. L. REV. 1, 2 (2015).

[879] *Id.* at 21.

[880] SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 5-21 (Keith Voelker, 4th ed. 2010).

[881] *Id.*

court on a case-by-case basis.[882] Courts have not given an umbrella determination declaring all athletes public figures and tend to determine this on the facts of each individual case.[883] What is clear, however, is that protecting speech under the First Amendment is a priority.

[882] Stephen G. Strauss, *Defamation and the Collegiate Athlete: The Case of Failed Reporting and an NFL Drug Test,* 33 SPORTS LAW. J. 51, 53–54 (1996).

[883] *Id.*

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APPENDIX: IRB APPROVAL FORM

ACTION ON EXEMPTION APPROVAL REQUEST

Institutional Review Board
Dr. Dennis Landin, Chair
130 David Boyd Hall
Baton Rouge, LA 70803
P: 225.578.8692
F: 225.578.5983
irb@lsu.edu | lsu.edu/irb

TO: Lacey Sanchez
Mass Communication

FROM: Dennis Landin
Chair, Institutional Review Board

DATE: November 16, 2016

RE: **IRB#** E10235

TITLE: Defamation and Student Athletes - Determining their Level of Protection and Journalist's Freedom

New Protocol/Modification/Continuation: New Protocol

Review Date: 11/16/2016

Approved X **Disapproved**_____

Approval Date: 11/16/2016 **Approval Expiration Date:** 11/15/2019

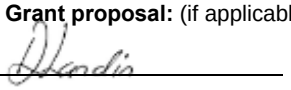
Exemption Category/Paragraph: 2b; 4b

Signed Consent Waived?: No

Re-review frequency: (three years unless otherwise stated)

LSU Proposal Number (if applicable):

Protocol Matches Scope of Work in Grant proposal: (if applicable)

By: Dennis Landin, Chairman 

PRINCIPAL INVESTIGATOR: PLEASE READ THE FOLLOWING –
Continuing approval is CONDITIONAL on:

1. Adherence to the approved protocol, familiarity with, and adherence to the ethical standards of the Belmont Report, and LSU's Assurance of Compliance with DHHS regulations for the protection of human subjects*
2. Prior approval of a change in protocol, including revision of the consent documents or an increase in the number of subjects over that approved.
3. Obtaining renewed approval (or submittal of a termination report), prior to the approval expiration date, upon request by the IRB office (irrespective of when the project actually begins); notification of project termination.
4. Retention of documentation of informed consent and study records for at least 3 years after the study ends.
5. Continuing attention to the physical and psychological well-being and informed consent of the individual participants, including notification of new information that might affect consent.
6. A prompt report to the IRB of any adverse event affecting a participant potentially arising from the study.
7. Notification of the IRB of a serious compliance failure.
8. **SPECIAL NOTE: When emailing more than one recipient, make sure you use bcc. Approvals will automatically be closed by the IRB on the expiration date unless the PI requests a continuation.**

* *All investigators and support staff have access to copies of the Belmont Report, LSU's Assurance with DHHS, DHHS (45 CFR 46) and FDA regulations governing use of human subjects, and other relevant documents in print in this office or on our World Wide Web site at http://www.lsu.edu/irb*

VITA

Lacey Sanchez is a native of Baton Rouge, Louisiana. She received her Bachelor of Science degree majoring in English from Louisiana State University. She was accepted into the LSU Graduate School. She plans to graduate with her Master of Mass Communication in May 2017. She is dual enrolled at the LSU Law Center and plants to graduate with her Juris Doctor and Diploma in Civil Law in May 2018.